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# The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of *Roe v. Wade*

By SETH F. KREIMER\*

## I. Introduction: The Abortion Controversy and the Fate of Substantive Due Process

For the last quarter century, *Roe v. Wade*<sup>1</sup> has provided a landmark for constitutional analysis. Those who envisioned judicial review primarily as a backstop to majoritarian politics began with the proposition that *Roe*, like *Lochner v. New York*<sup>2</sup> before it, was insupportable as constitutional doctrine, and rejected a role for the Court in enforcing unenumerated constitutional rights. Those who viewed the Court as an appropriate standard bearer for extra-textual normative aspirations often admitted the weakness of *Roe*'s stated rationales, but nonetheless began with *Roe* as a touchstone and reasoned toward other rights.

A decade ago, the opponents of *Roe* seemed poised to triumph in the Supreme Court, but *Planned Parenthood v. Casey*<sup>3</sup> appeared to turn the tide.<sup>4</sup> Amidst a harshly divided series of opinions, a decisive plurality of the Court reaffirmed the vitality of *Roe*, if only as a matter of stare decisis, and endorsed, on its merits, the role of judicial review in the protection of unenumerated rights.<sup>5</sup> The plurality opinion buttressed the somewhat inchoate claims of "privacy" that underlay *Roe* with a constellation of rationales that built on rights to bodily autonomy, spiritual integrity, and gender

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\* Professor of Law, University of Pennsylvania Law School, Copyright October 1997. This essay has benefitted from the comments of my colleague, Matt Adler, as well as the information and insights I have obtained as a participant in the Greenwall Seminar on Social Sciences in Bioethics at the University of Pennsylvania. Any mistakes, misapprehensions or missteps are, of course, my own responsibility.

1. 410 U.S. 113 (1973).

2. 198 U.S. 45 (1905).

3. 505 U.S. 833 (1992).

4. A similar and parallel watershed arguably occurred in the political arena two years earlier with the rejection of Judge Robert Bork's nomination to the Supreme Court. See, e.g., Bruce A. Ackerman, *Essays on the Supreme Court Appointment Process: Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

5. See *Casey*, 505 U.S. at 846-53.

equality.<sup>6</sup> At the same time, the *Casey* dissenters attacked the plurality's project as an avatar of a judicial role rejected with the fall of *Lochner* in the constitutional reconstruction that attended the New Deal.<sup>7</sup>

In the intervening five years, the Court has been willing, if not eager, to take constitutional issue with the outcome of the democratic process in a series of cases,<sup>8</sup> but it has not invoked substantive due process in those confrontations.<sup>9</sup> Consequently, until last Term's assisted suicide cases, the Court has had no occasion to elaborate on the rationales for protecting reproductive autonomy, or how those rationales fit with the broader enterprise of protecting unenumerated rights. On both sides of the aisle, the accusation of reviving the substantive due process of *Lochner* has remained an epithet of choice; indeed the *Casey* dissenters tended to deny the legitimacy of the entire enterprise of substantive due process analysis.<sup>10</sup>

This Term's assisted suicide cases bade fair to reopen the debate. The Court faced two separate circuits whose various opinions adopted at least four separate doctrinal approaches on a contested issue of public morality,

6. See *id.* at 856.

7. *Id.* at 998.

8. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Virginia*, 116 S. Ct. 2264 (1996); *Reno v. ACLU*, 117 S. Ct. 2329 (1997); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997); *Printz v. United States*, 117 S. Ct. 2365 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1994); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995).

9. The Court has rejected substantive due process challenges this Term outside the assisted suicide arena in *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1867 (1997); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997); and *Lambert v. Wicklund*, 117 S. Ct. 1169, 1172 (1997). Earlier post-*Casey* claims have been no more successful. See *United States v. Carlton*, 512 U.S. 26 (1994); *Albright v. Oliver*, 510 U.S. 266 (1994); *Concrete Pipe of Cal. v. Laborers Pension Trust*, 508 U.S. 602 (1993); *Reno v. Flores*, 507 U.S. 292 (1993).

The Court sustained a challenge to a punitive damages verdict in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996)—though it is not at all settled that a challenge to a jury verdict is quite the same as a challenge to the decisions of political branches.

10. For liberals accusing conservatives of reviving *Lochner*, see *Seminole*, 116 S. Ct. at 1176 n.60 (Souter, J., dissenting); *Lopez*, 514 U.S. at 549 (Souter, J., dissenting); *Dolan v. City of Tigard*, 512 U.S. 374, 406 (1994) (Stevens, J., dissenting); *Shaw*, 116 S. Ct. at 1907 (Stevens, J., dissenting) (accusing majority of relying on a "speculative substantive due process right").

For conservatives accusing liberals of misusing substantive due process, and questioning the legitimacy of the doctrine, see, for example, *TXO v. Alliance Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring); *Carlton*, 512 U.S. at 39. (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron . . ."); *Albright*, 510 U.S. at 275 (Scalia, J., concurring); *Foucha v. Louisiana*, 504 U.S. 71, 125 (1992) (Thomas, J., dissenting) ("so-called 'substantive due process'"); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (Rehnquist, J.) ("more generalized notion of 'substantive due process'"); *BMW*, 116 S. Ct. at 1611 (Scalia, J., dissenting) ("Substantive due process right" is an "unjustified incursion into the province of state governments."). But cf. *West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) (acknowledging "due process" right against prison physician's deliberate indifference).

as well as an orchestrated array of amicus briefs the like of which it had not encountered since *Casey*.<sup>11</sup> One might have expected that the specter of two circuits simultaneously wielding *Casey* to invalidate long-standing prohibitions of the criminal law would provoke the *Casey* dissenters again to attack the legitimacy of extra-textual judicial review. On the other hand, the rationales of bodily autonomy and spiritual integrity which had been sketched in *Casey* tended to support the decisions of the Second and Ninth Circuits that terminally ill patients should have a right to assistance in ending their lives. In determining whether or not, as I put it in an earlier commentary, one could be pro-choice but anti-Kevorkian,<sup>12</sup> the heirs of the *Casey* plurality could have been expected to solidify and clarify the basis of their decision.

In fact, neither outcome came to pass. The Court was unanimous in accepting *Roe* and *Casey*—and with them substantive due process analysis—as part of the contemporary constitutional canon.<sup>13</sup> Moreover, every opinion accepted a substantive extra-textual right to “bodily integrity” that, until now, had seemed only tenuously grounded. At the same time, the Court was unanimous in voting to reject the Second and Ninth Circuit’s opinions and remitting the basic issue of assisted suicide to the state and federal political processes.<sup>14</sup>

The Court’s unanimity on these issues, however, was voiced in no less than six separate opinions.<sup>15</sup> What remains unclear, therefore, is exactly how the Court accomplished these potentially contradictory results, or what the combination means for either the future of assisted suicide or of constitutional law. This article explores these questions.

*Washington v. Glucksberg*<sup>16</sup> marks the end of a generation of discord over the legitimacy of substantive due process. Nonetheless, I suggest that Justice Rehnquist’s majority opinion cannot sustain its claim that an “established method” of substantive due process analysis, rooted in history and tradition, explains both the abortion cases and *Glucksberg*.<sup>17</sup> I argue that although Justice Souter’s call for “arbitrariness review” based in the com-

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11. The LEXIS online computer service lists 62 briefs lodged with the Court in *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), and 61 in *Vacco v. Quill*, 117 S. Ct. 2293 (1997). By way of comparison, it lists 37 briefs in *Casey*.

12. See Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey and the Right to Die*, 44 AM. U. L. REV. 803 (1995).

13. *Casey*, 505 U.S. at 846-53.

14. See *Quill*, 117 S. Ct. at 2230-32; *Glucksberg*, 117 S. Ct. at 2274.

15. I leave to one side the majority opinion in *Quill* which depends on the basic proposition in *Glucksberg* that the prohibition of assisted suicide is not to be regarded with any heightened judicial skepticism. See *Glucksberg*, 117 S. Ct. at 2264-65.

16. 117 S. Ct. 2258 (1997).

17. *Id.* at 2260.

mon law can account for the outcome in *Glucksberg*,<sup>18</sup> it lacks constitutional mooring. By contrast, I maintain that the focus on physical suffering, informing the concurrences of Justices O'Connor, Breyer, and Ginsburg, is both constitutionally supportable and morally informative. Finally, I advance the proposition that whatever their individual failings, the opinions in *Glucksberg*, taken as a whole, do a signal service to the nation. In my view, the Court has redeemed the promise of *Roe* by respectfully considering a tragic conflict and providing frameworks for further moral argument by the rest of society.

## II. Substantive Due Process, the Body, and the Constitutional Canon

The unanimity of the Justices in *Glucksberg* powerfully illustrates the current status of substantive due process. For Justices O'Connor and Souter, who joined the prevailing plurality opinion in *Casey*, and Justice Stevens, who concurred separately, there is nothing new in the proposition that "substantive due process" review is a legitimate judicial enterprise, and that it encompasses the abortion right. In their separate opinions in the assisted suicide cases, each of these Justices assumes that in implementing the commands of the Due Process Clause, the Court has authority to invalidate legislation that is sufficiently at odds with our society's moral aspirations.<sup>19</sup>

Justice Breyer, who joined the court after the *Casey* decision, wrote an opinion accepting the legitimacy of the enterprise of identifying "arbitrary impositions and purposeless restraints" as well as "interests" that "require particularly careful scrutiny of the state needs asserted to justify their abridgement."<sup>20</sup> Justice Ginsburg, who is likewise new to the official debate, filed a cryptic concurrence in the judgment aligning herself with the views of Justice O'Connor.<sup>21</sup> Neither of these positions is much of a surprise.

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18. *Id.* at 2258.

19. See *id.* at 2277 (Souter, J., concurring); *id.* at 2306-07 (Stevens, J., concurring). Justice O'Connor's position is a bit more opaque. In light of her prior concurrence in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 289 (1990) (arguing that there is a fundamental right to refuse life sustaining medical treatment), it is clear that she sees a role for substantive due process in defense of bodily autonomy, but her concurrence in *Glucksberg* goes no further than "assuming" the recognition in an interest in avoiding terminal suffering, on the way to refusing to address it, 117 S. Ct. at 2303 (O'Connor, J., concurring).

20. *Glucksberg*, 117 S. Ct. at 2311 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

21. See *id.* at 2310. It is unclear exactly what methodology Justice Ginsburg believes is appropriate. Justice Ginsburg has tartly criticized the use of a "vague concept of substantive due

It is Justice Rehnquist's majority opinion in *Glucksberg* that provides the novelty. Although Justices Scalia, Thomas, and Rehnquist each dissented in *Casey*, they join the proposition that "[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights . . . to use contraception, to bodily integrity, and to abortion."<sup>22</sup> Justice Rehnquist wrote the majority opinion that contained this language; Justices Thomas and Scalia joined the majority opinion without reservation.<sup>23</sup> Unlike the *Casey* dissents, which contested the legitimacy of judicial involvement in the entire enterprise of enforcing unenumerated rights, the majority opinion in *Glucksberg* makes it unanimous among sitting Justices that the courts may intervene on behalf of unenumerated rights in general and reproductive autonomy in particular.<sup>24</sup> At least for the near future, the Supreme Court has reached an equilibrium in which the right to choose an abortion is accepted as a constitutionally protected interest on a par with the constellation of family, marriage, and contraception.

The majority opinions in the assisted suicide cases reaffirm, as well, the right to bodily integrity as a maxim of constitutional analysis. In *Glucksberg* the majority includes "bodily integrity" in its litany of consti-

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process, a 'raised eyebrow test' as its ultimate guide." *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1617 (1996) (citation omitted). She has suggested elsewhere that *Roe* would have been better resolved on equal protection grounds. See Ruth Bader Ginsburg, *Speaking in A Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1200 (1992).

22. 117 S. Ct. at 2267 (citations omitted). See *id.* at 2262 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices.") (citing *Casey*, 505 U.S. at 849-50). Justice Rehnquist's opinion was even able to muster an approving citation to *Roe* itself as supporting the proposition that the Court has protected "personal activities . . . identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Id.* at 2271. Moreover, the *Glucksberg* majority cited the joint plurality opinion in *Casey* as "the Court's opinion" which concluded "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Id.* at 2270 (quoting *Casey*, 505 U.S. at 846).

Justice Rehnquist's opinion in *Albright v. Oliver*, 510 U.S. 266, 272 (1994), had earlier cited *Casey* as according substantive due process protection in "matters relating to marriage, family, procreation, and the right to bodily integrity," but it did not mention abortion. Justice Scalia's special concurrence in *Albright* reiterated his opposition to substantive due process analysis outside of incorporation. *Id.* at 275-76 (Scalia, J., concurring).

Another indication of the state of affairs is the per curiam opinion in *Mazurek v. Armstrong*, 117 S. Ct. 1865, 1868 (1997), which rejected the plaintiffs' claim on the merits, but nonetheless cited *Roe* as setting the basic standard in the area of abortion.

23. See 117 S. Ct. at 2260.

24. Likewise, the per curiam decisions this Term, rejecting particular challenges to state statutes which interfere with the opportunities to obtain abortions, still accepted the legitimate role of the courts in judging whether interferences rose to a magnitude that imperilled conceded constitutional rights. See *Mazurek*, 117 S. Ct. 1865 (rejecting challenge to statute requiring abortions to be performed only by licensed physicians); *Lambert v. Wicklund*, 117 S. Ct. 1169 (1997) (rejecting challenge to parental notification requirement for abortions sought by minors).

tutionally protected interests.<sup>25</sup> This recognition provides a clear and welcome announcement of the constitutional stature of the physical rights of the citizens' persons against government intrusion—an affirmation that was not part of the rationale in *Roe v. Wade*. It was, after all, less than a quarter century ago that the Court intimated a strong general constitutional protection against bodily abuse by governmental officials,<sup>26</sup> and several members of the Court have in the interim suggested a limitation of substantive due process rights to those rights which have textual analogues in the Bill of Rights.<sup>27</sup> As late as last year, a circuit panel en banc held that a right to avoid sexual assault by governmental officials was not sufficiently well-grounded to form the predicate for criminal prosecution.<sup>28</sup> *Glucksberg* and *Quill*, combined with the comments this Term in *United States v. Lanier*,<sup>29</sup> put an end to any doubts that the federal courts can legitimately invoke the norms of substantive due process to protect citizens against physical abuse by the government in all venues.

The assisted suicide opinions reaffirmed, as well, the proposition that patients have a constitutionally protected right to refuse life sustaining

25. 117 S. Ct. at 2267. In *Vacco v. Quill*, 117 S. Ct. 2293 (1997), the Court reads *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), as based in a "well established, traditional right to bodily integrity and freedom from unwanted touching." 117 S. Ct. at 2301, (citing *Cruzan*, 497 U.S. at 278-79).

26. See *Ingraham v. Wright*, 430 U.S. 651, 671-74 (1977). *Ingraham* rejected a claim that brutal paddling of students constituted cruel and unusual punishment, but classified the right to avoid physical assault as a "liberty interest." In the same term, the Supreme Court for the first time accepted a prisoner's claim that the imposition of physical suffering by prison guards was constitutionally barred. See *Estelle v. Gamble*, 429 U.S. 97 (1976).

27. See, e.g., *Allbright*, 510 U.S. at 275 (Scalia, J., concurring); *id* at 273. (plurality opinion of Rehnquist, J.) ("Where a particular Amendment provides explicit textual source of constitutional protection . . . that Amendment, not the more generalized notion of 'substantive due process' must be the guide," (quoting *Graham*, 490 U.S. at 395)); *cf. Graham*, 490 U.S. 395 ("[A]ll claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment . . . rather than under a substantive due process standard").

Justice Scalia, despite his scorn for "substantive due process" in most areas, has at least once accepted the proposition that a prison physician who causes physical harm by deliberate indifference violates "the Fourteenth Amendment's protection against the deprivation of liberty without due process." *West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring).

28. See *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996) (*en banc*), *rev'd*, 117 S. Ct. 1219 (1997).

29. *Lanier*, 117 S.Ct. at 1228 n.7 ("*Graham v. Connor* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments . . . [rather than] the rubric of substantive due process." (citation omitted)).

As I have suggested elsewhere, the efforts to constrain physical abuse by government officials constitutes both one of the most prominent and one of the most eminently justifiable roles that judicial review plays in our current constitutional equilibrium. See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL OF RTS. J. 427 (1997).

treatment.<sup>30</sup> In *Cruzan*, the Supreme Court had assumed *arguendo* that a right to bodily integrity protected competent patients against being treated against their will.<sup>31</sup> This proposition could have been regarded as dictum. In *Glucksberg*, the right to refuse life sustaining treatment has advanced to the status of a maxim of constitutional law. This is no revolution, since the right to refuse such treatment is recognized in most states as a matter of local positive law,<sup>32</sup> but, again, it demonstrates how far the courts have come in two decades.

This unanimity of approval for protecting abortion as an unenumerated right and the reaffirmation of a more general right of bodily autonomy, however, mask a decided lack of consensus on other issues. The Justices disagreed on the analytical basis for the right to bodily autonomy and were far from clear as to how their reasoning meshes with the unanimous rejection of the plaintiffs' claims.

### III. The Majority's "Established Method": Constitutional Law as Tradition

In writing the Court's majority opinion, Chief Justice Rehnquist announced an intention to follow an "established method of substantive due process analysis."<sup>33</sup> This alone is striking rhetoric, implicitly acknowledging a legitimate tradition of extra-textual judicial review in which the method is "established." By claiming to identify an "established method" of review, the majority opinion reaches further: it purports to enunciate a mode of analysis which both characterizes and justifies the outcomes that make up this tradition.

In the majority's "established method," determining whether an asserted right can be characterized as "fundamental" plays a central role. According to the majority, "special protection" which invokes something beyond a demand for rational justification presupposes a "threshold" determination that the challenged state action implicates a "fundamental right."<sup>34</sup> This, in turn, involves two types of showings: that the claim in question is "objectively deeply rooted in this Nation's history and tradition"<sup>35</sup> and that it is "implicit in the concept of ordered liberty," such that

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30. Only Justice Stevens could be read as suggesting that the right to refuse treatment is protected only for the terminally ill. See *Glucksberg*, 117 S. Ct. at 2306 (Stevens, J., concurring in the judgment).

31. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990).

32. See 1 ALAN MEISEL, *THE RIGHT TO DIE* 16-17, 38-41, 50 (2d ed. 1995).

33. 117 S. Ct. at 2268 & n.17 ("established approach").

34. *Id.* at 2268.

35. *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).



"neither liberty nor justice would exist if they were sacrificed."<sup>36</sup> According to the majority, in the absence of such showings, the claim in question can demand only that the government act in a fashion that is rationally related to legitimate government interests.<sup>37</sup>

The claim for assisted suicide fails at this threshold. From the proposition that "a consistent and almost universal tradition . . . has long rejected the asserted right, and continues explicitly to reject it today,"<sup>38</sup> follows the conclusion that the right did not achieve the status necessary to trigger intrusive judicial scrutiny. Thus the opinion merely recites a variety of state interests, from the "symbolic and aspirational" interest in the preservation of human life, to a concern for avoiding suicide by those who are depressed or otherwise vulnerable, to concerns regarding the "time-honored" line in medical ethics between healing and harming.<sup>39</sup> Each is sufficiently rational to sustain the statute, without investigating their relative strengths.

In sum, according to the majority, absent legislative irrationality, courts may intervene only to protect those "fundamental rights found to be deeply rooted in our legal tradition."<sup>40</sup> At one level, this seems quite straightforward. According to the majority, courts are not empowered to roam the fields of public policy measuring the acts of government against their own free-floating sense of morality.<sup>41</sup> Rather, the "guideposts" for exercising intrusive judicial review are to be found in the "Nation's history, legal traditions, and practices."<sup>42</sup> The Court seeks to preserve ancient liber-

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36. 117 S. Ct. at 2268 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). Later, the Court characterizes the relevant activities as those "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment." *Id.* at 2271 (emphasis added).

37. *See id.* at 2268. The majority also emphasizes that "we have required . . . a 'careful description' of the asserted fundamental liberty interest." *Id.* It is hard to know exactly what to make of this requirement; few lawyers would suggest utilizing sloppy or haphazard descriptions of legal concepts.

Two bracketing observations are possible. First, the "requirement" is not the same as the "most specific level" requirement suggested by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J.). A citation to *Michael H.* is conspicuous in its absence. Second, there is some suggestion that courts should avoid abstraction. The majority rejects the claim that what is at issue is "a right to die." It distinguishes *Cruzan* as an opinion involving a right to "refuse life-saving hydration and nutrition" or "medical treatment," and maintains that the question involved in these cases is whether the Due Process Clause protects a "right to commit suicide which itself includes a right to assistance in doing so." 117 S.Ct. at 2269-70. Elsewhere, the right is referred to as a liberty interest in "ending one's life with a physician's assistance." *Id.*

38. *Id.* at 2269.

39. *Id.* at 2274.

40. *Id.* at 2268.

41. In this, the majority purports to differ dramatically from Justice Souter's concurrence, which it accuses of requiring "complex balancing of competing interests in every case." *Id.* Justice Souter denies this. *See infra* text accompanying notes 82-87.

42. 117 S. Ct. at 2268.

ties; it guards against the rare innovations or aberrations that threaten longstanding and deeply rooted values of our society.

The majority's approach explains some of the cases in the substantive due process canon. In *Pierce v. Society of Sisters*<sup>43</sup> and *Meyer v. Nebraska*,<sup>44</sup> state legislatures adopted novel regulatory regimes which interfered with traditional parental prerogatives in child-rearing. In *Rochin v. California*,<sup>45</sup> low-level officials sought to assault the bodily integrity of a suspect in a fashion repugnant to the common decency imbedded in national traditions of appropriate law enforcement. At another level, however, Justice Rehnquist's opinion is deeply mysterious, for in seeking to articulate an "established method" of substantive due process analysis, the majority's approach conspicuously fails to explain another set of cases which it acknowledges to be part of the canon of substantive due process.<sup>46</sup>

The majority's "settled approach" has difficulty accounting for cases like *Eisenstadt v. Baird*<sup>47</sup> or *Loving v. Virginia*.<sup>48</sup> Worse, what the majority refers to as the "established method" cannot encompass the cases which are most crucially relevant to assisted suicide: *Cruzan* and *Roe* itself.

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43. 268 U.S. 510, 530-32 (1925).

44. 262 U.S. 390, 397-99 (1923).

45. 342 U.S. 165, 172-74 (1952).

46. The approach is also in some tension with cases decided by members of the *Glucksberg* majority under other constitutional provisions where the Court overturns legislation which accords with settled practices, by invoking extra-textual values as has been its wont in recent years. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993) (invoking right to electoral districting process in which race does not "predominate"); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (announcing right to color blind decision-making by federal government under substantive "equal protection component" of Due Process Clause); or unwritten "principles" of governmental structure which have only tangential support in the practices of the constitutional framers. See also *Printz v. United States*, 117 S. Ct. 2365 (1997); *Seminole Tribe v. Florida*, 116 S.Ct. 114 (1996).

47. 405 U.S. 438, 443 (1972) (protecting distribution of contraceptives to unmarried couples).

In the precursor to *Eisenstadt*, Justice Harlan maintained in *Poe v. Ullman* that the criminalization of the use of contraceptives by married couples was unprecedented in world history. 367 U.S. 497, 554-55 (1961) (Harlan, J., dissenting). He also noted, however, that on the underlying question of whether the state could coercively inhibit the distribution and sale of contraceptives and otherwise inhibit their use, "not too long ago the current of opinion" embodied in governing statute, was entirely hostile to contraception. *Id.* at 546 n.12. Moreover, *Eisenstadt* involved the distribution of contraceptives to unmarried rather than married couples. 405 U.S. at 443.

48. 388 U.S. 1, 11-12 (1967) (protecting interracial marriages). The definition of who can engage in marriage, of course, has been traditionally subject to state control, from age limitations to the definition of incest to the legal monopoly on divorce. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211-12 (1888) (noting that the state may define rights, duties and obligations of married couples). Miscegenation laws like those *Loving* overturned go back to the founding of the republic. See, e.g., *Pace v. Alabama*, 106 U.S. 583 (1882) (upholding harsher punishment of inter-racial sexual activities); *Dred Scott v. Sandford*, 60 U.S. 393, 412-15 (1857) (Taney, C.J.) (giving account of colonial and early American prohibitions on marriage by members of different races).

The majority characterizes the "right assumed in *Cruzan*" of "refusing unwanted [lifesaving] medical treatment" as the fruit of a "long legal tradition protecting the decision to refuse unwanted medical treatment."<sup>49</sup> The earliest exemplar of the "tradition" of refusing medical treatment that the Court identified in *Cruzan*, however, was a case from the late 19th century which rejected, on procedural grounds, the effort to compel medical examination of a tort plaintiff.<sup>50</sup> While tort law has long viewed unconsented touchings in general as technical batteries, once a patient submitted to medical ministrations, the legal scope of patient autonomy was far from clear during the eighteenth and nineteenth centuries; the common law development of informed consent doctrine has been largely an artifact of the second half of the twentieth century.<sup>51</sup> As Justice Scalia pointed out in his concurrence in *Cruzan*, there is a common law history both of mandating life-saving medical treatment and physically interfering with efforts to end one's life.<sup>52</sup> Moreover, the "tradition" in question is strictly a matter of

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49. *Glucksberg*, 117 S. Ct. at 2270.

50. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), cited in *Cruzan*, 497 U.S. 261, 269 (1990). The Court's *Cruzan* opinion referred as well to cases from the 1980s indicating that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment," 497 U.S. at 277. It cited *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125 (1914), a case which did not involve life-saving treatment, and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which in fact allowed compulsory vaccination. 497 U.S. at 278.

51. See Martin S. Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in 3 PRESIDENT'S COMMISSION FOR STUDY OF ETHICAL PROBLEMS IN MEDICINE, MAKING HEALTH CARE DECISIONS (1982); JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984); RUTH R. FADEN, ET AL., *A HISTORY AND THEORY OF INFORMED CONSENT* 79 (1986) (providing account of 19th century doctor taking responsibility for decision not to amputate patient's leg without informing patient); *id.* at 74 (arguing that rudimentary consent-seeking in surgery during the 18th and 19th century was not based in respect for patient's autonomy, but on "practical and clinical necessity."); *id.* at 117 (observing that 18th century courts recognized tort only if medical experts testified that seeking consent was an "ordinary and beneficial part of medical therapy."); *id.* at 123-25 (describing controversy about scope of consent requirement).

52. *Cruzan*, 497 U.S. at 297-98 (Scalia, J., concurring) (citing *John F. Kennedy Mem'l Hosp. v. Heston*, 58 N.J. 576 (1971)); *Application of President & Dirs. of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964). Indeed, if the common law right to refuse life-sustaining treatment was as well established as the *Glucksberg* majority makes it out to be, it is hard to fathom why the doctors in *Quinlan*, 355 A.2d 647 (1976)—which the Court in *Quill* characterized as "the first state-court decision explicitly to authorize withdrawing lifesaving treatment," 117 S. Ct. at 2299—could claim that their "existing medical standards" precluded withdrawal of the respirator. See *Quinlan*, 355 A.2d at 666 (holding that refusal to order withdrawal of respirator was proper "under the law as it then stood").

Justice Stevens' concurrence highlights the fact that the evolution toward the right to refuse life-sustaining treatment has been an evolution away from the common-law equilibrium. 117 S. Ct. at 2306 ("We have recognized, however, that this common-law right to refuse treatment is neither absolute nor always sufficiently weighty to overcome valid countervailing state inter-

common law. As the same Justices who comprised the *Glucksberg* majority were at pains to point out in another case this Term, society's interest in avoiding danger "to self or others" has traditionally justified a legislature in overriding protected interests in avoiding medical treatment.<sup>53</sup>

Recently, a substantial social and legal consensus has developed that allows competent patients a virtually untrammelled right to refuse life-saving medical treatments.<sup>54</sup> But this consensus emerged in the last two decades; it is hardly a subsisting tradition from the legal regime of the Founding or Reconstruction, when medical treatment was itself a far chancier and less efficacious enterprise. If this counts as a "deeply rooted tradition," roots grow quickly indeed, and the justification for judicial intervention must be phrased in terms of an evolving social consensus rather than an aspiration to retain traditional liberties. This is not necessarily a bad thing, but it is not what the majority purports to be doing when it keys analysis to "traditional liberties."<sup>55</sup>

The gap between the methodology articulated by the majority as a means of identifying "fundamental" liberties and the constellation of liberties it accepts as fundamental, moreover, grows to a yawning chasm when the *Glucksberg* majority confronts *Roe* and *Casey*. The burden of the current doctrine on abortion, as the majority articulates it, is "that a woman has a right, before her fetus is viable, to an abortion 'without undue interference from the state.'"<sup>56</sup> Yet, as Justice Rehnquist stressed in his dissents in *Casey* and *Roe*, that right did not reflect the legal tradition of the Founding or Reconstruction. At common law, abortion after quickening was thought to be a crime; by the time of the framing of the Fourteenth

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ests . . . . In most cases, . . . the right to refuse unwanted medical treatment will give way to the State's interest in preserving human life.").

53. See *Kansas v. Hendricks*, 117 S. Ct. 2072, 2074 (1997) (upholding confinement that was arguably necessary to treat mental abnormality and to protect the public from sexual predators (citing *Jacobson*, 197 U.S. at 26 (approving mandatory vaccination))). Cf. *Botsford*, 141 U.S. at 252-53 (recognizing that right of bodily autonomy may be overridden in proceedings of public import including divorce and criminal proceedings).

54. See 1 ALAN MEISEL, *THE RIGHT TO DIE* 37-77 (2d ed. 1995).

55. At some points, the majority opinion flirts with the notion of an evolving consensus. In setting the scene for its legal discussion, Justice Rehnquist lays out not only the common law history of the prohibitions of suicide but the contemporary political debate, 117 S. Ct. at 2265-67, and concludes that after "serious, thoughtful examinations of physician-assisted suicide . . . we have not retreated from this prohibition." *Id.* at 2267. (By "we," Chief Justice Rehnquist presumably does not mean the Supreme Court, but the people of the United States).

So, too, the majority's introductory discussion highlights "history, tradition and *practice*." *Id.* (emphasis added). A bit later, the majority describes "our Nation's history, legal traditions, and *practices*" as the "crucial guideposts" in substantive due process decision-making. *Id.* at 2268 (emphasis added) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)); see also 117 S. Ct. at 2268 n.17. What is not clear is whether current practice can merely negate an otherwise "rooted" historical tradition, or whether it can germinate roots itself.

56. 117 S. Ct. at 2270 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)).

Amendment, abortion at any stage of pregnancy had been legislatively prohibited in 28 of the 37 states, and by the beginning of the twentieth century, every state prohibited abortion.<sup>57</sup> It is, as Justice Rehnquist has quite rightly noted for a quarter century, difficult to say that a "deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental.'"<sup>58</sup> Indeed, unlike the emerging trend toward a state-level right to refuse treatment at the time of *Cruzan*,<sup>59</sup> free availability of abortion at the time of *Roe* was distinctly a minority position,<sup>60</sup> so that the Court's intervention could not even be justified as protecting an evolving consensus "tradition" of recent vintage.

At the core of the *Glucksberg* majority's opinion, therefore, is an unresolved contradiction. On one hand, the majority purports to accept abortion as part of the legitimate landscape of substantive due process, and to explain that landscape on the basis of an "established method." On the other hand, the historical test which the Court uses as a way of avoiding the normative argument that assisted suicide is a "fundamental right" works equally well to block the most important parts of the doctrine which the Court claims to accept.

It is possible, of course, that in the "established method," history simply has a veto, rather than a determinative vote. The majority's analysis begins with the question "whether this asserted right has any place in our Nation's traditions,"<sup>61</sup> and, finding a "consistent [continuing] and almost universal tradition" of rejection, it concludes that the right cannot be con-

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57. See *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting, joined by White, Scalia, and Thomas, JJ.); *Roe v. Wade*, 410 U.S. 113, 174-75 (1973) (Rehnquist, J., dissenting).

58. *Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., dissenting). See also *Roe*, 410 U.S. at 175. (Rehnquist, J., dissenting).

The nod in the *Glucksberg* opinion toward *Roe*'s statement that from the Founders to the 19th century "wom[en] enjoyed a substantially broader right to terminate a pregnancy" hardly provides a basis for protecting post-quickening abortions. See 117 S. Ct. at 2271 n.19 (quoting *Roe*, 410 U.S. at 140). The majority's history in *Roe* discloses that such abortions were held by most authorities to be illegal at common law, and illegal by statute from the mid 19th century. 410 U.S. at 133-34. Nor does it account for the fact that this broader availability was displaced at the end of the 19th century by virtually universal prohibition.

59. 497 U.S. 261, 270 (1990) (observing that "cases involving the right to refuse life-sustaining treatment have burgeoned" in the decade before the decision and reviewing major lines of authority); *id.* at 290-92 (O'Connor, J., concurring) (reviewing legislation on health care proxies).

60. See, e.g., LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 49-51 (1990) (most existing reforms "hardly increased access to abortion"; New York's permissive law hung by a thread); *id.* at 140 (only New York was unaffected by the ruling); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE* 184 (1990) (New York, Washington, Hawaii, and Alaska had repealed abortion laws; all but New York had residency requirements).

61. 117 S. Ct. at 2269.

sidered a "fundamental" one.<sup>62</sup> By the time the majority opinion reaches its discussion of *Casey*, its account of the activities the Court has protected is phrased in the disjunctive as those "so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."<sup>63</sup> This could offer a way out of the contradiction. Perhaps the rights recognized in *Roe* and *Cruzan* need only be "fundamental to the concept of ordered liberty." While not "deeply rooted," they are at least not at odds with a "consistent and almost universal tradition."<sup>64</sup>

But this escape comes at a high price to the restrained role the *Glucksberg* majority seeks to adopt. The "established methodology" of due process becomes simply a requirement that, where the right in question has not been consistently rejected throughout American history, the Court thinks hard about the meaning of the "concept of ordered liberty."

#### IV. The Constitution and the Common Lawyer: Souter's Concurrence

Justice Rehnquist's majority opinion purports to use history to define the metes and bounds of unenumerated rights; it strives to constrain judicial intervention. But the boundaries it establishes are too narrow to encompass the prior cases it seeks to explain. Justice Souter's concurrence, by contrast, can explain almost any judicial intervention: he embraces a system in which judges are responsible to evaluate all government actions, in the form of what he calls "arbitrariness review."<sup>65</sup> Although the prohibition of assisted suicide is sustainable, according to Justice Souter it is because that prohibition is, on its moral merits, not an "arbitrary" one.

There is something enormously refreshing about reading an opinion by a Justice who is unashamed in his celebration of substantive due process in the teeth of scholarly and judicial criticism of the doctrine. Calling upon

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62. *Id.* at 2269-71. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) ("[L]ong-standing and still extant societal tradition withholding the very right pronounced" was not present in *Griswold v. Connecticut*, 381 U.S. 479 (1965)). The Court in *Michael H.* argued that such a tradition precludes the classification of the right as "Fundamental." *Id.*

63. 117 S. Ct. at 2271.

64. *Id.* at 2269.

65. *Id.* at 2279, 2280 (Souter, J., concurring).

Like Justice Souter, Justice Stevens' position in his separate concurrence allows the Court to critically evaluate state interests in areas that impact on basic freedom in matters "central to dignity and autonomy," at least in relation to "making decisions about how to confront imminent death." *Id.* at 2307 (quoting *Cruzan*, 497 U.S. at 229). Since his analysis does not add much to his earlier opinion in *Cruzan*, 497 U.S. at 351-57 (Stevens, J., dissenting), I treat Justice Stevens's *Glucksberg* analysis only in passing.

the second Justice Harlan's dissent in *Poe v. Ullman*<sup>66</sup> as his model, Justice Souter invokes "two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action"<sup>67</sup> to support a judicial role of protecting the "rights to be free from 'arbitrary impositions and purposeless restraints'" imposed by the government in any area.<sup>68</sup> Unfortunately, to be refreshed is not necessarily to be persuaded.

### A. Text, Tradition and Self Government

No one is likely to argue in favor of "arbitrary impositions" and "purposeless restraints" on the basis of their intrinsic merits. Certain long-standing doubts nonetheless persist about the source of the federal judiciary's authority to supplant what it regards as "arbitrary" political actions, in the absence of a textual mandate in the Constitution. Justice Souter does not say a great deal to allay those doubts.

Justice Souter claims to be impelled by an obligation "to construe constitutional text and review legislation for conformity to that text[,]"<sup>69</sup> but his argument in this respect is baffling. Quoting Justice Harlan's *Poe* dissent, he notes that "[w]here due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which . . . could . . . nevertheless destroy the enjoyment of all three."<sup>70</sup> This is an accurate account of a strictly procedural due process, but it gives no indication of why the constitutional text requires anything else.

The judicial obligation to police "arbitrary impositions" could rest on political postulates about the impropriety of absolute legislative supremacy<sup>71</sup> or of actions taken without appropriate grounding in the public interest.<sup>72</sup> It might ground itself on a belief that the Constitution presupposes a modicum of basic morality as a prerequisite to regarding legislative enactments as "law."<sup>73</sup> But Justice Souter does not make these arguments, or even allude to them.

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66. 367 U.S. 497 (1961).

67. 117 S.Ct. at 2277.

68. *Id.* at 2282 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

69. *Id.* at 2281.

70. *Id.* (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

71. See, e.g., *Calder v. Bull*, 3 U.S. 386, 387-88 (1798) (Chase, J.) ("I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute and without control."); cf. 117 S. Ct. 2281 n.7 (Souter, J., concurring) ("[I]f it does not necessarily import this, then the legislative power is absolute.").

72. See, e.g., Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

73. Cf. Randy Barnett, *Getting Normative: The Role of Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 96 (1995) (arguing that in order to be legitimately binding stat-

The closest Justice Souter comes to justifying "arbitrariness review" is his repeated reference to a "tradition" of judicial intervention "which has never been repudiated in principle."<sup>74</sup> If common law judges are entitled to rely on an unbroken line of practice in the execution of their office, he seems to suggest, constitutional judges can do likewise. Such a tradition could draw on the support of Burkean claims about social stability and the wisdom of accumulated experience, the role of continuity in the common law process, and a desire not to disappoint the expectations of citizens who have come to rely on the courts as a backstop against the potential excesses of the political branches.<sup>75</sup> Indeed, such a tradition, if widely accepted, could constitute what Cass Sunstein has recently referred to as an "incompletely theorized agreement,"<sup>76</sup> supported by the convergence of a series of potential justifications.

Unfortunately, Justice Souter believes that the tradition in question begins with *Dred Scott*,<sup>77</sup> and encompasses *Lochner*.<sup>78</sup> These are hardly cases which command broad support; a tradition that includes them is one whose claim to a principled allegiance from large parts of the legal or general community is in serious dispute.<sup>79</sup> Where Justices O'Connor and

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utes, they must be just, and judges have an obligation to review statutes for their consistency with the rights specified by justice).

My own suspicion is that the natural law idea that immoral and arbitrary enactments cannot be legitimately considered to be "law" is the best account of a connection between the Due Process Clause and the review that Justice Souter proposes. Cf. *Calder*, 3 U.S. at 388 (Chase, J.) ("An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

74. 117 S. Ct. at 2280 ("tradition of substantive due process review . . . [and] the Judiciary's obligation to carry it on"); *id.* at 2281 ("enduring tradition of American constitutional practice").

75. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); cf. *Rochin v. California*, 342 U.S. 165, 171 (1952) (citing Edmund Burke).

76. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1737 (1995).

77. 60 U.S. 393 (1857).

78. 198 U.S. 45 (1905).

79. Justice Souter claims to avoid the mistakes of *Dred Scott* and *Lochner* by repudiating the use of "extratextual absolutes." 117 S. Ct. at 2281. See also *id.* at 2279 (cases in *Lochner* line "invoked a correct standard of constitutional arbitrariness review, [but] harbored the spirit of *Dred Scott* in their absolutist implementation.").

It is hard to say much about Chief Justice Taney's opinion in *Dred Scott*, since his entire due process analysis is contained in a single sentence: "[A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law." 60 U.S. at 450 (Taney, C.J.) For myself, I find a certain cryptic moral obtuseness, but can discern no peculiarly "absolutist" approach here, for everything turns on what is an "offense against the laws."

In his characterization of the *Lochner* era, Justice Souter lapses into dubious history, for it was precisely a willingness to evaluate the relative weights of claims of public policy and private right that led the *Lochner* era courts to respond to the Brandeis briefs. Rights of property and contract were not regarded as absolute; courts upheld a vast array of health and safety regulations.



Breyer invoke norms that can claim wide support, the potentially unlimited character of "arbitrariness review" combined with its noxious past robs it of a claim to consensus.

## B. The Method of "Arbitrariness Review"

Whatever the deficiencies in the justifications Justice Souter provides for "arbitrariness review," it is worth trying to understand exactly how it works, for this could illuminate its legitimacy.

As a general matter, Justice Souter embraces the obligation of judges to examine the "relative 'weights' or dignities of contending interests."<sup>80</sup> When the resolution reached by the political branches "falls outside the realm of the reasonable," the judiciary is obligated to invalidate the act in question as unconstitutional.<sup>81</sup>

Justice Souter does not contemplate an entirely unrestrained judicial recalibration of the balance between public interest and private right.

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During the *Lochner* era, the cases in which the Court sustained health, safety and welfare legislation far outnumber the cases where the legislation was invalidated. See CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, at 1362-63 (1973) (listing regulations of medicine, dentistry, pilots, railroad engineers, grain elevators, detectives, cigarettes, cosmetics, junk dealers, and others upheld against substantive due process attacks). Regulations of storage of gasoline, public laundries, wooden buildings, and similar activities were upheld, as were regulations regarding garbage, food, drugs, and cosmetics. See *id.* at 1368, 1370-71.

*Lochner* itself invalidated limitations on hours of bakers (though it affirmed the viability of limitations on working conditions). 198 U.S. at 64. But the Court had previously upheld limitations on the hours of miners, see, e.g., *Holden v. Hardy*, 169 U.S. 366, 398 (1898), and subsequently upheld hours limitations for women, see, e.g., *Muller v. Oregon*, 208 U.S. 412, 422-23 (1908). Cf. *Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Riley v. Mass.* 232 U.S. 671 (1914). Ultimately, even the ten-hour day struck down when limited to bakers in *Lochner* itself was held to avoid "arbitrariness" when applied to all workers. *Bunting v. Oregon*, 243 U.S. 426, 438-39 (1917).

Again, it is possible to construct a stronger case for a tradition of extra-textual review, beginning with the popular assumptions about unenumerated rights in the founding generation and the framing of the Ninth Amendment, see, e.g., Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987), and running through early Marshall Court opinions (which Souter in fact cites at 117 S. Ct. at 2278), to anti-slavery jurisprudence and the Privileges and Immunities Clause. Professor Black's work is perhaps the most elegant recent attempt. See CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997). But Justice Souter does not do this. He relies simply on an observation of what the Supreme Court has periodically done and said.

80. 117 S. Ct. at 2281, 2283 ("[T]he business of such review is . . . [to weigh] clashing principles . . . within the history of our values as a people. It is a comparison of the relative strengths of opposing claims that informs the judicial task."). "The kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual." *Id.* at 2280.

81. *Id.* at 2281. "[W]hen the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied . . . the statute must give way." *Id.* at 2283.

Rather, the approach he advocates would apparently begin with an evaluation of the "constitutional stature" of the private claim at stake.<sup>82</sup> In the absence of a threshold showing of an interest "sufficiently important to be judged 'fundamental'," <sup>83</sup> judicial review is cursory. "At relatively trivial levels" of statutory imposition, the government's action <sup>84</sup> is to be sustained unless "governmental restraints are undeniably irrational as unsupported by any imaginable rationale."<sup>85</sup> On the other hand, for values recognized to be truly deserving of constitutional stature, a state may infringe on the private interest only if the state's "justifying principle" is sufficiently "commensurate" with the individual interest that the legislation is not "arbitrarily or pointlessly applied".<sup>86</sup> Such situations are, Justice Souter assures us, "suitably rare"; in making this judgment, moreover, the courts are obliged to defer to balances which are "within the zone of reasonableness."<sup>87</sup>

Thus, Justice Souter contemplates two working steps: courts must identify the "constitutional stature" of the individual interests asserted, and then determine whether the state's "justifying principle" is reasonably "commensurate" with the interests.<sup>88</sup> This may sound like cost-benefit balancing, but it apparently is not. In making each judgment, according to Justice Souter, the judge is obliged to use the "common law method" and the "usual canons of critical discourse."<sup>89</sup> In particular, the judge is to use a series of "new examples and new counterexamples[.]" and compare the case at hand with those which have gone before.<sup>90</sup>

Each step is problematic.

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82. *Id.*

83. *Id.* at 2282, 2283 n.9.

84. Justice Souter regularly writes of the review of "legislation," but then interpolates citations to the review of administrative actions. See, e.g., 117 S. Ct. at 2283 (citing *Youngberg v. Romeo*, 457 U.S. 307, 320-21 (1982)). As my colleague Matt Adler has recently written, there are strong reasons to believe that the legitimacy of wide-ranging judicial review may be stronger where the actions are those of administrative agencies. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997). And as I have suggested elsewhere, the great bulk of constitutional intervention by the judiciary occurs in non-legislative arenas. Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL OF RTS. J. 427 (1997).

85. 117 S. Ct. at 2282.

86. *Id.* at 2283. A state "may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted." *Id.* at 2282.

87. *Id.* at 2281-82.

88. *Id.* at 2283.

89. *Id.* at 2284.

90. *Id.*

### 1. Identifying "Certain Interests"

In determining the "weight or dignity" of the individual interest asserted, Justice Souter clearly does not mean the court should simply evaluate whether the interest is important to the individual asserting it, or to the reasonable person in the individual's position. Carolene Products Corporation, after all, could have been put out of business by the challenged federal legislation, but Justice Souter characterizes the company's interest as "trivial."<sup>91</sup> Rather, Justice Souter maintains that in determining the "weight" of the interest asserted, the court is obliged to limit its recognition to those values "truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by 'the traditions from which [the Nation] developed', or [those] revealed by contrast with 'the traditions from which it broke.'"<sup>92</sup>

Taken on its own terms, this is not much of a limitation. The "values expressed in the constitutional text" are capacious. Both Due Process Clauses, after all, protect "life, liberty, and property." After augmenting these clearly expressed textual values with the Founders' regard for "the pursuit of happiness," and the enumeration of "fundamental" privileges and immunities in *Corfield v. Coryell*,<sup>93</sup> it is difficult identify a serious interest that would not rise to "constitutional stature," even without a reference to other "traditions."

But, read charitably, Justice Souter may be saying that text and historical practice simply provide the raw materials that courts must work with to evaluate the "fundamentality" of the interests in question. Not every effort to pursue happiness need be regarded as fundamental, but only those that the Court through the "common law method" concludes play a crucial role in the American polity.<sup>94</sup> In this case, apparently, the "common law method" is one of reasoning by analogy.

Justice Souter gives as a parade example of the way in which the process should work his account of Justice Harlan's dissent in *Poe*. According to Justice Souter, the Harlan dissent used the common law method to ascertain that marital contraceptive use was encompassed within the "certain

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91. *Id.* at 2282.

92. *Id.* at 2383 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

93. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3230) ("[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety"). Justice Souter cites Justice Harlan's invocation of *Corfield* as a proper example of a court identifying "fundamental" rights. 117 S. Ct. at 2282.

94. Justice Souter is fond of the "common law method." He uses the phrase no fewer than four times in two pages. See 117 S. Ct. at 2283-84.

interests requir[ing] particularly careful scrutiny of the state needs asserted to justify their abridgment."<sup>95</sup>

Seeking to employ the same method, Justice Souter argues in *Glucksberg* that the "liberty interest in bodily integrity" has been recognized in the common law of battery which prohibits medical invasions and forced medication, the constitutional right to refuse life-sustaining treatment, and the constitutional right against government prohibitions of medical aid in obtaining an abortion, as well as the "high value traditionally placed on the medical relationship," and the authorization by many states to administer analgesic medication which may hasten death.<sup>96</sup> He concludes that the "importance of the individual interest here . . . cannot be gainsaid."<sup>97</sup>

All of this may be quite sensible reasoning by analogy, if the question were presented to a common law court whether assisted suicide should be a tort or a common law crime. But the state of Washington has already exercised its legislative power to pre-empt common law decision-making, and, as Justice Marshall defined the Court's duty in such cases, "it is a constitution we are expounding."<sup>98</sup> I like a good analogy as well as the next law professor, but is assisted suicide appropriately analogized to abortion, the use of psychoactive drugs, wearing long hair, body piercing, or murder? What Justice Souter has not done is to identify how the analogies he chooses map into the Court's constitutional mandate.<sup>99</sup>

Inspired by Justice Souter, I went back to re-read Justice Harlan's *Poe* dissent, and alas, it appears that Justice Souter does not quite live up to the model he invokes. Justice Harlan does begin his *Poe* dissent with the proposition that Souter quotes: that in assaying a law's congruence with the "balance our nation has struck between . . . liberty and the demands of organized society[,] . . . certain interests require particularly careful scrutiny of state needs asserted to justify their abridgement."<sup>100</sup>

To identify those interests, however, Justice Harlan looks not simply to historical or common law practice in America, but to the purposes he

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95. *Id.* at 2282.

96. *Id.* at 2287-88.

97. *Id.* at 2290.

98. *McCulloch v. Maryland*, 4 U.S. (1 Wheat.) 316, 407 (1819).

99. This uncritical importation of the "common law method" into constitutional adjudication is particularly mystifying given Justice Souter's strong account last Term of the "Framer's [fear of] judicial power over substantive policy and the ossification of law that would result from transforming common law into constitutional law." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1176 (1996) (Souter, J., dissenting).

100. 367 U.S. at 543.

discerns in the Constitution itself.<sup>101</sup> True, Justice Harlan adopts the proposition that the "the privacy of the home . . . by common understanding throughout the English speaking world, must be granted to be a most fundamental aspect of 'liberty.'"<sup>102</sup> But, he does not rest with an account of Anglophone public opinion; he argues in support of the proposition that this protection of the home is a part of the purposes of the Constitution.

Beginning with the Third and Fourth Amendments' protections against quartering troops and unreasonably searching the home, Justice Harlan argues that "the rational purposes, historical roots and subsequent development of the relevant provisions" support the constitutional protection of privacies within the home.<sup>103</sup> Because the constitutional protection constitutes a "rational continuum,"<sup>104</sup> the Court is entitled to look to other constitutional provisions and constructions in elaborating a non-textual protection that coheres with the remainder of the Constitution. The Court can legitimately claim to be exercising its warrant of construing the Constitution because the basic building blocks come from the Constitution itself.<sup>105</sup> This is precisely what Justice Souter's use of "the common law method" fails to do.<sup>106</sup>

101. See *id.* at 544 ("Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.").

Again, in defining the importance of the principles of free speech, "[i]t is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, which have led to their present status." *Id.* (internal citations omitted).

102. *Id.* at 548.

103. *Id.* at 550. Harlan's account begins with Justice Brandeis's vision of the purposes of the Fourth and Fifth Amendments as embodying the "right to be let alone"; it continues through the "sweep of the Court's decisions" under the Fourth and Fourteenth Amendments to conclude that "the home [which is the subject of Fourth Amendment protection] derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Id.* at 550-52.

104. *Id.* at 543.

105. The protection of liberties by this methodology is, in Harlan's use, *constrained* by historical common law practice; "intimacies which the law has always forbidden and which can have no claim to social protection" cannot claim protection of the Constitution under Harlan's principle. *Id.* at 553. The impetus for protection, however must come from the constitutional tapestry. See *id.*

106. I am not at all sure that a truly Harlanesque argument could be constructed for a constitutionally dignified right of access to medical assistance in committing suicide. Medical care itself has long been a regulated and regulable activity. See, e.g., *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889) (upholding constitutionality of medical licensing); see also *United States v. Rutherford*, 442 U.S. 544 (1979) (upholding constitutionality of federal drug regulation prohibiting laetrile for use by terminally ill cancer patients). And the right to avoid government impingements on bodily welfare has been recognized, almost exclusively outside of the abortion cases and in *Estelle v. Gamble*, 429 U.S. 97 (1976), as a right against the government's active intrusion on bodily integrity.

## 2. "Relative Weights of Contending Interests"

Assuming that a right of "constitutional stature" has been identified by the "common law method," the second step of Justice Souter's analysis requires the Court to determine whether the state's "justifying principle" is arbitrarily incommensurate with the imposition.<sup>107</sup> This is not the place to rehearse the on-going barrage of criticism that has been directed at the process of "weighing" individual liberties against state interests in defining constitutional rights.<sup>108</sup> Again, charitably construed, Justice Souter does not necessarily require courts to finely evaluate the relative importance of the contending interests at the margins. Rather, he claims that the Court's only role is to identify a disproportion between the state's claims and those of the individual so great as to be described as "arbitrary"; only such arbitrary disproportions justify judicial intervention. Any interest that could reasonably be judged to be of a magnitude comparable to the one infringed will be adequate. Giving Justice Souter the further benefit of his invocation of Justice Harlan and the "common law method," it is further possible to define this "arbitrariness review" not in terms of the independent judgment of the Court in a particular instance, but in terms of a comparison between the tradeoff at issue here and those which have been sanctioned elsewhere in constitutional jurisprudence or settled tradition.<sup>109</sup>

Having determined that the interest of terminal patients in obtaining medical assistance in ending their lives is constitutionally "important," Justice Souter nonetheless concludes that the interest in maintaining a sys-

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The strongest argument seems to me the claim of spiritual integrity of the sort advanced by Justice Stevens, but to the extent that objections are keyed to consequentialist dangers, it is hard to invoke this claim with sufficient force.

107. *Glucksberg*, 117 S. Ct. at 2283.

108. For classic attacks, see, for example, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1441-50 (1962); Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 746-48 (1963); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); C. Edwin Baker, *Unseasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulation*, 78 NW. U. L. REV. 937 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Mark Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

I have elsewhere argued that the attacks are, for some rights, misdirected. See Seth F. Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PENN. L. REV. 1, 108-42 (1991).

109. By analogy, for Justice Harlan, the balance in question is not one reached by independent judicial evaluation, but "the balance which our Nation . . . has struck between liberty and the demands of organized society." *Poe*, 367 U.S. at 542. "The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Id.* At the point that he actually evaluated the balance in *Poe*, the decisive consideration for Justice Harlan was the "utter novelty of the enactment," the fact that in the nation as a whole, no other governmental entity had applied a criminal prohibition directly to marital use of contraceptives. *Id.* at 554.

tem which "protect[s] terminally ill patients from involuntary suicide and euthanasia, both voluntary and non-voluntary," is adequate to justify the state's prohibition.<sup>110</sup> As Justice Souter constructs the argument, this is not a hard call.

Justice Souter puts to one side the state's claim of an interest in protecting life generally, or of discouraging knowing and voluntary suicides, suggesting that "a moral judgment contrary to respondent's" may not be adequate to the task of counterbalancing the interests invoked.<sup>111</sup> Rather, he relies on the "dispositive" weight of the potential dangers of mistaken or involuntary suicide and euthanasia.<sup>112</sup> The decision to prohibit assisted suicide need not rest on morally controverted grounds, for, according to the states which defend the laws, a system which permits assisted suicide will likewise entail the risk of lethal abuse and mistake. "[M]istaken decisions may result from inadequate palliative care or a terminal prognosis that turns out to be error; coercion and abuse may stem from the large medical bills that family members cannot bear or unreimbursed hospitals decline to shoulder."<sup>113</sup> A system which allows assisted suicide provides some citizens with a desired end to a painful and debilitated life, according to Justice Souter, but puts others at risk of having their life ended against their will. The state cannot grant release to some without imposing danger on others, and no one doubts the state's interest in protecting all of its citizens from being killed involuntarily.

In this tragic balance, according to Justice Souter, the importance of "a State's interest in protecting those unable to make responsible decisions and those who make no decisions at all" against the termination of their lives "is beyond question";<sup>114</sup> it is of a quality commensurate with the interests that prohibition infringes. On the empirical question of the magnitude of the risk in question, Justice Souter professes to be agnostic, but in the absence of a clear showing that the risk is minimal, he is unwilling to say that the legislature has acted arbitrarily.<sup>115</sup>

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110. *Glucksberg*, 117 S. Ct. at 2290-91 (citing Brief for Petitioner at 34-35).

111. *Id.*

112. *See id.*

113. *Id.*

114. *Id.* at 2292.

115. "The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. . . . [T]he basic concept of judicial review . . . bars any finding that a legislature has acted arbitrarily when . . . there is a serious factual controversy over the feasibility of recognizing the claimed right without at the same time making it impossible for the State to engage in an undoubtedly legitimate exercise of power; facts necessary to resolve the controversy are not readily ascertainable through the judicial process; but they are more readily subject to discovery through legislative factfinding and experimentation." *Id.*

At one level, I can have no objection to this analysis, since it tracks one that I have previously suggested.<sup>116</sup> At another level, however, Justice Souter is misleading when he suggests that the key rests in a "legislature's superior opportunities to obtain the facts necessary for a judgment about the present controversy," or that "facts currently unknown could be dispositive," and goes on to intimate that "legislative foot-dragging in ascertaining the facts" could form the basis for judicial intervention.<sup>117</sup>

Certainly, constitutional analysis must start with the facts. The plaintiffs before the Court suffered pain and physical debilitation; there is every reason to expect that their situations were not unique.<sup>118</sup> On the other hand, it is also clear that in the experiment with legalization of assisted suicide in the Netherlands, some patients have been subjected to life ending interventions "without explicit request,"<sup>119</sup> and there is every reason to expect an American experiment to prove at least equally problematic.

It is possible that a consensus will emerge that all physical pain can be medically addressed, and the legalization in Holland or Oregon (should it survive) will prove so extensively and unambiguously lethal that the justification for prohibition will be placed beyond question. Conversely, legalization could go so smoothly that it will become utterly clear that there are no dangers of collateral consequences, and prohibition of assisted suicide is utterly without justification aside from moral opposition.<sup>120</sup> But for anything between these extremes, facts are unlikely to resolve the matter of constitutional mandate.<sup>121</sup>

First, consider the dangers attending legalization. Suppose that reliable estimates are available which would lead any legislator to conclude legalization of assisted suicide will lead to the death of only 10 individuals

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116. See Kreimer, *supra* note 12.

117. *Glucksberg*, 117 S. Ct. at 2293.

118. See, e.g., J. Addington-Hall et al., *Dying from Cancer: Results of a National Population-based Investigation*, 9 PALLIATIVE MEDICINE 295 (1995) (1/3 of terminal cancer patients experience great pain); Joanne Lynn, M.D., et al., *Perceptions by Family Members of the Dying Experience of Older and Seriously Ill Patients*, 126 ANNALS OF INTERNAL MED 97 (1997) (55% of all patients surveyed spent the last three days of their life conscious and in pain); SUPPORT Investigators, *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients*, 274 JAMA 1591, 1594 (1995) (50% of terminal patients in study who died in hospital experienced moderate or severe pain at least half of the time during their last 3 days of life).

119. *Glucksberg*, 117 S. Ct. at 2291-92.

120. For Justice Harlan, whom Justice Souter claims as a model, moral opposition could be an adequate basis for most exercises of the police power. See *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).

Justice Souter, however, may be inclined to conclude that unadorned moral judgments are not adequate to justify the particularly burdensome laws at issue here without more. Such a principle certainly could justify the outcomes in *Roe* and *Casey*.

121. This is not to say that facts may not be of importance to policy-makers seeking to choose among the wide spectrum of constitutionally acceptable policies.



per year in circumstances that are not substantially competent, informed and voluntary. Suppose that it can be reliably shown that there are no other dynamic effects. At the same time, suppose that equally reliable estimates suggest that 1000 individuals who would honestly and legitimately see death as a release from physical and spiritual agony will be able to escape those circumstances every year because of the legalization of physician assisted suicide. Would a legislative choice to retain the prohibition be unconstitutionally "arbitrary"?

The answer turns not on the facts that the legislature finds, but on the values it is entitled to embody in law. According to one recent report, 69 people in the last quarter century have been released from death row because they were later found to be factually innocent.<sup>122</sup> For opponents of the death penalty this seems strong evidence that the penalty is unacceptable, even if it has a deterrent impact on murders in a much larger number of cases. Even if one disagrees with that judgment—which I do not—it would be hard to characterize it as "arbitrary." The crucial moral issue is not how many lives are at issue on each side, but the evaluation of the relative moral import of saving innocent lives by deterrence and risking taking them by official act.

So too with assisted suicide. When comparing the risk of a small number of involuntary deaths with the benefit of a large number of escapes from suffering it is not enough to count bodies. Plausible moral judgments could claim that death is incalculably worse than suffering,<sup>123</sup> or that the distributional consequences of imposing a risk of death which falls most heavily on the least advantaged members of society outweighs the cost to a broader class of relatively privileged individuals who will feel a loss of dignity in their last days.<sup>124</sup> Moreover, countervailing and plausible indeterminate concerns point to potential second and third order effects on the medical profession, the willingness of the victims of debilitating disease to seek to endure rather than escape, the incentives to improve palliative care, and the regard for the terminally ill. None of these issues are likely to be factually determinate.

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122. Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent* (visited March 22, 1998) <<http://www.essential.org/orgs/dpic/inn.html>>.

123. Compare Alastair Norcross, *Comparing Harms: Headaches and Human Lives*, 26 PHIL. & PUB. AFFAIRS 135 (1997) (discussing arguments for and against sacrificing lives to avoid suffering) with Larry S. Temkin, *A Continuum Argument for Intransitivity*, 25 PHIL. & PUB. AFFAIRS 175, 191 (1996) (arguing that the sacrifice of lives to avoid suffering is immoral).

124. White men tend to view risks as systematically lower and more acceptable than females and non-whites. James Flynn et al., *Gender, Race, and Perception of Environmental Health Risks*, 14 RISK ANALYSIS 1101, 1102 (1994).

Once countervailing considerations are qualitatively commensurate with the suffering that attends prohibition, legislatures are entitled to the final word in resolving these dilemmas. They are entitled, not because they are better fact-finders than courts, but because within broad constitutional constraints popularly elected legislators are entitled to exercise independent moral judgment. No factual developments are likely to change this.

The same is, of course, true on the other side. If it turns out that only 10 Americans must live for 10 days each every year in physical agony as a price of a prohibition that saves 1000 depressed or vulnerable Americans from being induced to end their lives without full and voluntary consent, one might conclude that a cost-benefit accounting requires prohibition. But a legislative detremination that a commitment to individual liberty in matters of high moral import dominates the need to protect the vulnerable from potential misuse of that liberty could not be condemned as arbitrary. This is so, not because the legislature is a "better fact finder" than the Court, but because its value commitments are constitutionally legitimate.

## V. Constitutional Law as Common Decency

If Justice Rehnquist and Justice Souter's opinions were the only ones in *Glucksberg*, an observer might be justified in concluding that substantive due process analysis has lost its germinal potential, and that the abortion cases maintain what vitality they have only by grace of *stare decisis*. But Justice Rehnquist wrote for only four of his fellow Justices, and one of those—Justice O'Connor—filed a concurrence. Justice O'Connor, as the senior author of the joint plurality of *Casey*, seems more likely to successfully reconcile the abortion cases and *Glucksberg* than Justice Rehnquist who, after all, was not enamored of *Roe* from the beginning. In addition to joining the *Glucksberg* majority, Justice O'Connor authored a separate brief and somewhat cryptic concurrence, which drew the adherence of Justices Ginsburg and Breyer. Together with the concurrence of Justice Breyer, Justice O'Connor's opinion bears the seeds of a persuasive synthesis of *Casey* and *Glucksberg*.

### A. The Abortion and Gender: A Road Not Taken

The *Casey* plurality brought to the fore the importance of gender to the analysis of abortion. The link between control of reproductive capacity and the capacity to transcend traditional gender roles appeared several times in

the joint opinion's analysis.<sup>125</sup> I have argued elsewhere that one basis for distinguishing abortion from assisted suicide is abortion's special salience for women.<sup>126</sup> Unlike a prohibition on abortion, a prohibition on assisted suicide does not require any definable social group in the population to bear a concentrated burden for the benefit of society's moral choices. Nor does it threaten to lock members of a previously subordinated group into a set of social roles to which they have been relegated in the past by societal expectations.

The analysis of gender is largely absent, however, from the discussion in *Glucksberg*. Justice O'Connor's concurrence gives the general issue of equality attention in the following fashion:

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.<sup>127</sup>

Given the facts of biology, the composition of state legislatures and the tradition of selective indifference to the effects of childbearing on the status of women, a similar statement about abortion would sound distinctly hollow. None of the other discussion in any of the opinions, however, picks up this thread.<sup>128</sup>

## B. The Problem of Pain

Justice O'Connor's concurrence contains a second evocative theme, one which rings potentially controlling echoes in other opinions. She inti-

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125. See *Casey*, 505 U.S. at 852 (state cannot insist on its own vision of woman's role by mandating child-bearing); *id.* at 856 ("[T]he ability of women to participate equally in the economic and social life of the Nation is facilitated by their [right to obtain abortions]"); *id.* at 896 (rejection of traditional subservient role of women in family implies rejection of husband notification requirement); *id.* at 928 (Blackmun, J., concurring) (arguing that prohibition of abortion denies women equal status). See also *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 789-92, 802-04 (1993) (Stevens, J., and O'Connor, J., dissenting). Likewise, Justice Ginsburg has previously suggested that the link between pregnancy and gender would have been a better basis for *Roe*. See Ginsburg, *supra* note 21.

126. See Kreimer, *supra* note 12, at 849-53.

127. *Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring).

128. Issues of equality appear on the other side of the scales in the majority's discussion of the State's "interest in protecting vulnerable groups . . . from abuse, neglect and mistakes." *Id.* at 2273. The concern with an "insidious bias against the handicapped" and the protection of "disabled and terminally ill people from prejudice, negative and inaccurate stereotypes," and social indifference, as well as an account of Washington's claim that "all persons's lives . . . regardless of physical or mental condition are under full protection of the law" suggest that a concern for equality of burdens weighs against recognizing a right of assisted suicide. *Id.* at 2272-73 (citing *Compassion in Dying*, 79 F.3d at 592-93).

mates that she might acknowledge a "constitutionally cognizable interest in obtaining relief from the suffering [patients] may experience in the last days of their lives" in circumstances different from the ones before the Court.<sup>129</sup> By "suffering," Justice O'Connor apparently means patients in "great pain," of the sort that can be alleviated by the medication that is in fact available in both New York and Washington.<sup>130</sup>

Justice Breyer, who joins Justice O'Connor's opinion, emphasizes in his separate opinion the "legal significance" of Justice O'Connor's views.<sup>131</sup> Justice Breyer's separate concurrence suggests that he might find a basis in "our legal tradition" for a "right to die with dignity" compounded of elements of personal dignity, medical treatment and freedom from state-inflicted pain.<sup>132</sup> But for Justice Breyer, like Justice O'Connor, "the avoidance of severe physical pain (connected with death) would have to comprise an essential part of any successful claim."<sup>133</sup>

This focus on physical suffering raises immediate questions. Justices O'Connor, Ginsburg and Breyer are aware that the process of dying carries with it the prospect of suffering that extends beyond the physical. Justice O'Connor begins her opinion by contemplating the prospect of "the despair that [perhaps] accompanies physical deterioration and loss of control of basic bodily and mental functions."<sup>134</sup> Physical suffering is not the most common source of desire for assisted suicide, either in the Netherlands where it is legal or, as best as one can determine, in the United States where it is extra-legal.<sup>135</sup> Indeed, the plaintiffs in *Glucksberg* complained of both

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129. 117 S. Ct. at 2303 (O'Connor, J., concurring).

130. *Id.*

131. *Id.* at 2310 (Breyer, J., concurring).

132. *Id.* at 2311.

133. *Id.* ("[the] avoidance of unnecessary and severe physical suffering"). "New York and Washington do not force a dying person to undergo that kind of pain." *Id.* State laws "do not interfere by bringing the State's police powers to bear." *Id.* at 2312. "Were state law to prevent . . . the administration of drugs as needed to avoid pain at the end of life—the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue." *Id.*

134. *Id.* at 2303 (O'Connor, J., concurring).

135. For the United States, see, e.g., William Breitbart et al., *Interest in Physician Assisted Suicide Among Ambulatory HIV Infected Patients*, 153 AM. J. PSYCH. 238, 241 (1996) (finding no correlation between pain and desire for assisted suicide); Anthony L. Black et al., *Physician Assisted Suicide and Euthanasia in Washington State* 275 JAMA 919 (1996) (stating that 75% of patients requesting assisted suicide or euthanasia were concerned about being a burden to their families; 35% were concerned about experiencing severe pain); Robert Blendon et al., *Should Physicians Aid their Patients in Dying?: The Public Perspective*, 267 JAMA 2568, 2660 (1992) (stating that among those who would consider ending their lives in case of a terminal illness, 47% cited "fears of burdening their families," 20% cited fear of pain).

For the Netherlands, see, e.g., Johanna H. Groenewoud, *Physician-Assisted Death in Psychiatric Practice in the Netherlands*, 336 NEW ENGLAND J. MED. 1795 (1997) (stating that among psychiatric patients requesting assisted suicide or euthanasia, 68% cited the absence of any hope

pain and indignity. As Justice Souter emphasizes, "The patients here sought not only an end to pain (which they might have had, although perhaps at the price of stupor) but an end to their short remaining lives with a dignity that they believed would be denied them by powerful pain medication, as well as by their consciousness of dependency and helplessness as they approached death."<sup>136</sup>

Why, then, do Justices Breyer and O'Connor focus on physical pain as the touchstone of a possible constitutional right? What might be the provenance and dimensions of this focus on physical pain?

### 1. Legal Sources

A discernable line of cases extends some constitutional cognizance to the bodily integrity of the individual. The line begins in the 19th century; it flourishes most recently in *Cruzan* and *Casey*.<sup>137</sup> But this right does not necessarily relate to pain; it is grounded in "rights to bodily integrity and freedom from unwanted touching," and asserts the citizen's sovereign control over all aspects of her person.<sup>138</sup> The earliest of this line of cases, *Union Pacific R.R. Co. v. Botsford*, involved a medical examination to be conducted "in [a] manner not to expose the person of the plaintiff in any indelicate manner."<sup>139</sup> These cases contemplate a right to assert sover-

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of improvement, 29% cited a desire not to be a burden to others, 18% cited pain or physical suffering); Paul J. Van der Maas et al., *Euthanasia and Other Medical Decisions Concerning the End of Life*, 338 LANCET 669, 672 (1991) (stating that pain was the reason for request for assisted suicide or euthanasia in less than half of cases); G. van der Wal et al., *Euthanasia and Assisted Suicide II: Do Dutch Family Doctors Act Prudently?*, 9 FAM. PRAC. 135, 138 (1992) (same).

136. 117 S. Ct. at 2289 (Souter, J., concurring). Plaintiffs "would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain." *Id.* at 2276. Justice Stevens also alludes to the issue in passing: "avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 2307 (Stevens, J., concurring); "[t]he interests of a person who because of pain, incapacity or sedation finds her life intolerable." *Id.* at 2308.

137. See *Casey*, 505 U.S. at 849 ("It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's . . . bodily integrity." (citing *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Rochin v. California*, 342 U.S. 165 (1952))). See also *Cruzan*, 497 U.S. at 269 (citing *Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); 497 U.S. at 287 (O'Connor, J., concurring) ("Because our notions of liberty are inextricably intertwined with our idea of physical freedom and self determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." (citing *Rochin*, 342 U.S. 165; *Botsford*, 141 U.S. 250; *Winston*, 470 U.S. 753; *Schmerber v. California*, 384 U.S. 757 (1966))).

138. See *Vacco*, 117 S. Ct. at 2301.

139. 141 U.S. 250.

eighty over one's own body by avoiding any unwanted touching; the physical impingement need not necessarily involve the infliction of pain.<sup>140</sup>

The issue in these cases is, for the most part, one of the degree of intrusion into self-sovereignty; pain is at most an element in the calculus of constitutionality.<sup>141</sup> Moreover, these cases involve common law batteries—actions by others that impinge on the bodily integrity of the individual from the outside. Governmental prohibitions of actions which affect an individual own body have not regularly invoked any similar level of constitutional scrutiny.<sup>142</sup> And the right provided by these cases is not a strong one, it can be overbalanced by legitimate, not necessarily compelling, state interests.<sup>143</sup>

There is, however, another line of cases where pain plays a more central, powerful, and determinative role. The Eighth Amendment's ban on cruel and unusual punishment directly addresses the perception that the Constitution should prevent the state from being party to the infliction of brutal pain on its citizens. Whatever else it prohibits, there is a fair consensus that the Eighth Amendment will not allow state officials knowingly to impose brutal pain even on those convicted of heinous crimes. Even for those sentenced to death, the Court has held for more than a century that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty . . . are forbidden."<sup>144</sup> "Unnecessary and wan-

140. In *Cruzan*, the plaintiff was in a persistent vegetative state and there is no indication the feeding tube was painful. See 497 U.S. at 266. In *Winston*, the operation was to be carried out under anaesthesia. See 470 U.S. at 764.

141. Cf. *Schmerber*, 384 U.S. at 771 ("[Blood test] involves virtually no risk, trauma or pain"); *Winston*, 470 U.S. at 761 (pain is an element of the "extent to which the procedure may threaten the safety or health of the individual"); *Jacobson*, 197 U.S. at 39 (intrusion might not be allowed if it "would seriously impair . . . health, or . . . cause . . . death").

142. See *United States v. Rutherford*, 442 U.S. 544 (1979) (use of unproven and unlicensed medication); *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921) (use of narcotics); cf. *Whalen v. Roe*, 429 U.S. 589 (1977) (same).

*Casey*, of course, expands the concept of bodily integrity to include control of abortion, and several justices in *Glucksberg* further expand the concept. Susan Wolf argues, with some persuasiveness, that *Casey* bears a family resemblance to prior cases because it involves the exclusion of an unwanted external element (the fetus) from the woman's body and seeks a return to the status quo before the unwanted external element. Susan Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference*, in *PHYSICIAN-ASSISTED SUICIDE: ETHICAL POSITIONS, MEDICAL PRACTICE, AND PUBLIC POLICY OPTIONS* 167 (Robert Weir ed. 1997). She suggests that the exclusion of this unwanted external element is of particular importance to women.

Whether or not this analogy is ultimately persuasive, the abortion cases, which I treat below, are the only bodily integrity cases that speak to the issue of government prohibition of self-sovereignty outside of the realm of physical battery.

143. In *Botsford*, for example, the result seems to turn on the absence of precedent "in a personal action," as opposed to examinations in criminal cases or divorces, where such examination would be permitted. 141 U.S. at 252.

144. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

ton infliction of physical pain" has been universally conceded to be outside of the scope of legitimate punishment.<sup>145</sup> So, too, even before the Court applied the Fifth Amendment's protections against self-incrimination to the states, torture to obtain criminal convictions was outside of the moral universe delineated by the Constitution. The concept of ordered liberty implied that "[t]he rack and torture chamber may not be substituted for the witness stand."<sup>146</sup>

Physical confinement by the government, or even bondage, may be acceptable under appropriate circumstances;<sup>147</sup> raw imposition of pain is not.

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As applied to capital cases, the boundaries of the prohibition on torture have allowed substantial pain to accompany execution. Compare *Gray v. Lucas*, 463 U.S. 1237, 1237-39 (1983) (Burger, C.J., concurring in denial of certiorari) with *id.* at 1240-47 (Marshall, J., dissenting from denial of certiorari) (describing gruesome and painful death by cyanide gas which can extend over several minutes); *Gomez v. United States Dist. Ct.*, 503 U.S. 653, 654 (1992) (Stevens, J., dissenting from vacation of stay) (describing painful death from cyanide gas which extended over ten minutes); *Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari) (describing electrocution as a painful experience lasting several minutes).

The Court has, nonetheless suggested that lingering and excruciating pain is out of bounds even for executions. See *In re Kemmler*, 136 U.S. 436, 447 (1890) (commenting that "punishments are cruel when they involve torture or a lingering death") (upholding electrocution); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (observing that "the traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence [as part of the] prohibition against the wanton infliction of pain.").

145. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (denial of medical care for "serious medical needs" violates the Eighth Amendment) (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976)); 429 U.S. at 103 ("[U]nnecessary suffering is inconsistent with contemporary standards of decency."); *Helling v. McKinney*, 509 U.S. 25, 31, (1993) (reaffirming *Estelle*: Eighth Amendment prohibits unnecessary and wanton infliction of pain); *id.* at 33 (conditions of confinement that are sure or very likely to cause serious illness and needless suffering violate the Constitution); *Hudson v. McMillian*, 503 U.S. 1 (1992) (reaffirming "general requirement" that the Eighth Amendment proscribes "unnecessary and wanton infliction of pain" or torture, even if no serious physical injury eventuates); *id.* at 26 (Thomas, J., dissenting) ("Diabolic or inhuman punishments by definition inflict serious injury. That is not to say the injury must be, or always will be, physical. 'Many things . . . may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without just cause.'") (quoting *Williams v. Boles*, 841 F.2d 181, (7th Cir. 1988)); cf. *Weems v. United States*, 217 U.S. 349, 370 (1910) ("cruelty by laws . . . inflicting bodily pain or mutilation" was core evil at which Eighth Amendment was directed); *O'Neil v. Vermont*, 144 U.S. 323, 339 (1891) (Field, J., dissenting) ("[The] designation . . . is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering.")

To violate the Eighth Amendment, the imposition in question must be the result of either intent or deliberate indifference, see, e.g. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), but knowledge of the situation of the patients affected by the ban on assisted suicide can hardly be disavowed. *Id.* at 843 n.8; cf. *Estelle*, 429 U.S. at 105 n.13 (citing *Resweber*, 329 U.S. 459) (unconstitutional cruelty can result from "a series of abortive attempts, or a single cruelly willful attempt").

146. *Brown v. Mississippi*, 297 U.S. 278, 284-85 (1936).

147. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (denial of bail for dangerous individuals); *Kansas v. Hendricks*, 117 S. Ct. 2072, 2077 (1997) (incarceration of "sexually vio-

If there are certain physical sensations that the state cannot legitimately inflict on prisoners in retaliation even for the most heinous of crimes, presumably the state similarly may not inflict them on innocent individuals.<sup>148</sup>

There may be some novelty in suggesting that the state is constitutionally barred not only from directly imposing severe pain, but also from preventing the alleviation of physical suffering caused by other forces. But *Estelle*, two decades ago, concluded that deliberate indifference to serious medical needs of prisoners can impose constitutionally impermissible "wanton and unnecessary pain."<sup>149</sup> Indeed, one of the examples cited by the Court in *Estelle* as "cruel and unusual punishment" was refusal to administer a prescribed pain killer to prisoners after surgery.<sup>150</sup>

## 2. Pain or Suffering?

The focus on physical pain accords with a particular conception of the role of courts in enforcing unenumerated rights. Under this view, the constraints of the unwritten constitution are invoked most legitimately, not in support of an effort to assure the best that government can achieve, but in an effort to avoid the worst. Thus, most members of the Court have been reluctant to mandate an affirmative provision of benefits, but have been less constrained in preventing physical abuse by government officials. In the days before the incorporation of the Bill of Rights' protections regarding criminal procedure against the states, physical brutality was often the Court's touchstone in determining whether the efforts of law enforcement

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lent predator"); cf. *Youngberg v. Romeo*, 457 U.S. 307, 314-15 (1982) (physical restraint of mental patient); *Washington v. Harper*, 494 U.S. 210, 213-14 (1990) (forced medication of prisoner).

148. Cf. *Youngberg*, 457 U.S. at 321 (persons involuntarily committed are entitled to more considerate treatment than criminals); *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441 U.S. 520, 535-36 nn.16-17 (1979).

Indeed in his concurrence in *Resweber*, 329 U.S. at 469, Justice Frankfurter viewed the prohibition of willful infliction of great physical cruelty in a manner that violates standards of decency to be a part of the due process protection of "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

In *Ingraham v. Wright*, 430 U.S. 651, 670 n.39 (1977), the Court rejected an argument that the Eighth Amendment extended of its own force to constrain disciplinary paddling of students in school, and suggested that no real threat of abuse was present because state common law and statute guarded against "excessive physical punishment." The Court specifically refused to address the contention that substantive due process barred punishments as to students that would be unconstitutional as to convicted criminals. See *id.* at 659 n.12.

149. 429 U.S. 97; cf. *West v. Atkins*, 487 U.S. 42 (1988) (denial of surgery necessary to repair prisoner's Achilles tendon can constitute Eighth Amendment violation).

150. 429 U.S. at 104 n.10.



were at odds with deeply rooted tradition;<sup>151</sup> actions that shock the conscience have often involved active imposition of physical harm.<sup>152</sup>

The issue of assisted suicide provokes violent debates over what outcome should be regarded as "the worst" that government can wreak. From Patrick Henry's claim to regard death as preferable to the loss of liberty to the periodic espousal of the ideal of death before dishonor, parts of our cultural heritage support a perception that the senses of dependency and loss of control that accompany terminal illness can be worse than death itself. This belief, however, is far from universal. Other elements of our heritage dispute the perception that dependence and physical or mental incapacity reduce dignity. What some experience as degrading dependency, others regard as a physical condition that simply highlights the interdependence in which all human beings function. Indeed, with the rise of the disability rights movement, the claims that physical limitation is anathema to human dignity assume a potentially invidious character. And, of course, a strand of our heritage denies that a chosen death is ever an appropriate response to suffering.<sup>153</sup>

For the Court to embody a moral perception in a constitutional mandate, the Justices properly seek commitments that can claim a broad if not universal consent. In an increasingly diverse culture, the definition of dignity or mental suffering is not likely to provide that touchstone.<sup>154</sup> The focus on physical agony seeks to find that archimedean point in the experience of physical pain.

To the extent that public opinion is relevant, it seems that the public support in the United States currently for assisted suicide is focused in large measure on cases where suicide is the only alternative to physical suffering.<sup>155</sup> This breadth of support is hardly surprising. Pain is a basic

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151. See e.g., *Chambers v. Florida*, 309 U.S. 227 (1940); *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Irvine v. California*, 347 U.S. 128 (1954); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Brown*, 297 U.S. 278.

152. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).

153. Thus, the very controverted nature of dignity, which some proponents of assisted suicide see as a basis for excluding the state from prohibiting particular modes of writing life's last chapter, see, e.g., RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* 216-17 (1993), is itself a reason to be dubious of using dignity as the basis for overturning laws which plausibly rest on claims to protect others from physical danger and suffering.

154. A comparable issue was raised this Term in *Metro-North Commuter Railroad Co. v. Buckley*, 117 S. Ct. 2117 (1997), where the subjectivity of emotional suffering led the Court to reject a claim seeking tort recovery under the FELA for emotional distress in the absence of demonstrable physical symptoms.

155. See, e.g., Ezekiel Emanuel et al., *Euthanasia and Physician-Assisted Suicide: Attitudes and Experiences of Oncology Patients, Oncologists and the Public*, 347 LANCET 1805 (1996) (among oncology patients and the public, 70.5% and 66.5% respectively support assisted suicide).

physiological experience, common across cultures.<sup>156</sup> Few in our culture regard avoidable physical agony as good or even acceptable. It is an evil of great magnitude that extends beyond the physical; extreme pain totally occupies the psychic world.<sup>157</sup> Thus, in a parallel discussion in recent political philosophy, Professor Barry has suggested that avoiding physical harm is a good candidate for a consensus value because such harm is "deleterious from the point of view of a very wide range of conceptions of the good. . . . [O]n virtually any conception of the good, life goes better in the absence of physical injury."<sup>158</sup> It does not devalue the physical dependency experienced by large segments of our population to avow that physical agony may be unbearable.

Pain holds another attraction as a guidepost. To the extent that physical agony is an empirically definable sensation, it provides a hand-hold on the slippery slopes that surround assisted suicide. There is likely to be greater agreement on whether an individual is in agony than on whether he

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in the case of unrelenting pain, 38.3% and 36.2% on the basis that the patient is a burden on the family).

156. See, e.g., Roger C. Serlin et al., *When is Cancer Pain Mild Moderate or Severe? Grading Pain Severity by Its Interference with Function*, 61 PAIN 277 (1995) (validity of pain scales is reproducible across cultures within the United States and around the world); Knox H. Todd et al., *The Effect of Ethnicity On Physician Estimates of Pain Severity in Patients with Isolated Extremity Trauma*, 271 JAMA 925 (1994) (Hispanic and Anglo patients report identical assessments of pain for similar injuries); ERIC J. CASSELL, *THE NATURE OF SUFFERING AND THE GOALS OF MEDICINE* 103 (1991) ("Dedicated receptors—nociceptors—exist for painful stimuli whose neural impulses are conducted over specialized pathways in the peripheral nerves, spinal cord and brain . . . certain kinds of stimuli elicit the sensory response of nociception in every culture, now and forever.").

157. See, e.g., ELAINE SCARRY, *THE BODY IN PAIN* 33 (1985) ("[I]n serious pain the claims of the body utterly nullify the claims of the world"); *id.* at 54 (pain "obliterat[es] . . . the contents of consciousness").

158. BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 87-88 (1995). See also SISSELA BOK, *COMMON VALUES* 15-16, 18-19, 30, 57 (1995) (citing duties to refrain from coercion and violence as "moral minimalism" common across cultures); STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 90 (1989) (identifying "the great evils of human experience, reaffirmed in every age . . . : murder and the destruction of life, imprisonment, enslavement . . . physical pain and torture"); cf. MICHAEL WALZER, *THICK AND THIN* 10 (1994) (arguing for universal applicability of "negative injunctions . . . against murder, deceit, torture, oppression, and tyranny" that "respond to other people's pain and oppression"); SCARRY, *supra* note 157, at 52 (observing that "the most essential aspect of pain is its sheer aversiveness. While other sensations have content that may be positive, neutral or negative, the content of pain is itself negation.").

Professor Barry argues further from the fact that "every society falls back on a quite limited range of punishments" including "physical confinement, loss of bodily parts, pain, and death. Unless these were regarded by people with a wide variety of conceptions of the good as evils, they would not function reliably as punishments." BARRY, *supra*, at 141. This suggests, as well that an examination of the definition of unacceptable cruelty for purposes of punishment is a good place to start the investigation of social values that are sufficiently deeply rooted to be enforced by the Court.

or she is "terminal"<sup>159</sup> or "competent"<sup>160</sup> or subject to "undue influence,"<sup>161</sup>—the other bright line distinctions that have been suggested.<sup>162</sup> To the extent that approved medical interventions are keyed to the elimination of physical agony rather than ending life, they provide an opportunity in most situations to test the hypothesis that the elimination of physical suffering will in fact eliminate the desire for death. Efforts to lessen pain allow opportunities for second thoughts, and if the law permits only medical interventions that have the primary intent of alleviating physical suffering, the scope of the population at risk is limited to those who actually experience physical agony, and whose physical condition is sufficiently compromised that adequate palliative and analgesic intervention puts their health at risk.<sup>163</sup>

The focus of alleviation of physical pain carries the risk of hypocrisy, if physicians simply replace acquiescence in a desire for suicide with acquiescence in a patient's stated desire to be "double effected to death."<sup>164</sup>

159. On the difficulties of defining the "terminally ill," see Joanne Lynn et al., *Defining the "Terminally Ill: Insights from SUPPORT*, 35 DUQ. L. REV. 311 (1996).

160. Primary care physicians fail to detect 45-90% of psychiatric disorders. L. Eisenberg, *Treating Depression and Anxiety in Primary Care—Closing the Gap between Knowledge and Practice*, 326 NEW ENG. J. MED. 1080, 1081 (1992). Even among psychiatrists, an Oregon study suggests that only 6% were very confident they can determine in a single consultation whether a desire for suicide is the result of mental disorders. See Linda Ganzini et al., *Attitudes of Oregon Psychiatrists Toward Physician Assisted Suicide*, 153 AM. J. PSYCHIATRY 1631 (1994).

161. As a way of preserving patient autonomy, the Oregon assisted suicide statute makes it a crime to exercise "undue influence" in inducing an individual to choose assisted suicide. Oregon Ballot Measure 16, 1994, Section 4.02 (2). The vagueness of the standard seems self-evident.

Of course, since pain is a subjective sensation, a person determined to commit suicide could continue to report pain after it has in fact ceased.

162. See, e.g., Eric Chevlin, *The Limits of Prognostication*, 35 DUQ. L. REV. 337 (1996).

163. A right to assisted suicide rooted in rational self-determination runs the risk of a dangerously synergistic interaction with the tendency of physicians to underestimate the quality of life of those who are physically compromised. If doctors tend to view physically compromised existence as a low quality life more often than patient do, see e.g., Richard F. Uhlman & Robert A. Pearlman, *Perceived Quality of Life and Preferences for Life-Sustaining Treatment in Older Adults*, 151 ARCHIVES INTERNAL MED. 495 (1991); Robert A. Pearlman & Richard F. Uhlmann, *Quality of Life in Chronic Disease: Perceptions of Elderly Patients* 43 J. GERONTOLOGY M25, M27 (1988), there is a risk that doctors will regularly underestimate the degree to which suicide requests are the result of treatable depression.

By contrast, the fact that physicians tend to underestimate the level of their patients' pain, see Todd et al., *supra* note 156, at 147; *Quality Improvement Guidelines for the Treatment of Acute Pain and Cancer Pain*, 274 JAMA 1874 (1995); Grossman et al., *Correlation of Patient and Caregiver Ratings of Cancer Pain*, 6 J. PAIN SYMPTOM MGT. 53 (1991), provides another bit of friction on the slippery slope.

164. Standard medical ethics permit pain relief even when the medication may hasten death on the theory of the "principle of double effect" by which a foreseen but undesired effect may be acceptable if the intended effect of an action is itself normally permissible. See, e.g., Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Decisions Near the End of Life*, 267 JAMA 2229, 2231, 2233 (1992).

But here, as elsewhere, hypocrisy is the homage of vice to virtue. A medical regime which allows palliative risk continues to focus attention on avoiding pain, rather than imposing death, and at the margins, it will be less likely to be deformed by coerced or manipulated desires for death. For doctors who seek moral support in their efforts to undertake the difficult process of caring for dying patients and resist the temptations of dramatically ending the struggle, such a regime provides better moral landmarks than the alternatives.

### 3. *Pain, The Right to Choose and the "Right to Die"*

There are thus solid bases to invoke the interest in being free from pain as a common value adequate to ground a right to constitutional intervention. At first glance, however, this focus leaves Justices O'Connor, Ginsburg and Breyer in the same quandary as the majority when it comes to distinguishing the conceded right to abortion from the rejected right to assisted suicide. Pregnancy and childbirth often do involve physical suffering.<sup>165</sup> But laws forbidding abortion permit maternal anesthetics just as New York and Washington permit terminal sedation.

It is not in the role of pain per se, but in the balance the abortion cases strike between the interests of women's health and the interests of the state in preserving fetal life that a connection can be forged. In the abortion cases, the state may not overcome the general right to bodily autonomy by asserting an interest in preserving fetal life during the first two trimesters, when the status of a fetus as a human being is a matter of unresolved debate. In the third trimester, however, the state may intervene coercively to preserve a life that it is entitled to regard as a fully rights-bearing human being. So, too, in the case of assisted suicide, the individuals at issue are by all moral accounts human beings, and the state can invoke its interest in preserving human life at a compelling level. Indeed, in support of the system of prohibiting assisted suicide—which is what was challenged in *Glucksberg*—the state invokes a concern that human life will be ended by mistake or through coercion. If the abortion cases set a legitimate balance between bodily autonomy and preservation of life, then the state's interest in avoiding mistaken or coerced death is an adequate basis for imposing upon the right to bodily autonomy by prohibiting assisted suicide.

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One physician of my acquaintance commented to me on the number of patients whom he has seen "double effected to death" with pain-killing drugs.

165. See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . .").

But there is another level to the analysis. In the abortion cases, a danger to the health of the pregnant woman tips the balance again in favor of individual autonomy even in the third trimester. The state may not require a pregnant woman to sacrifice her health even for a viable fetus. Unrelenting physical agony, like the danger to a woman's health in the case of the third trimester abortion, seems to provide a counterweight of a magnitude equal to the state's claim of danger to life. A general prohibition of suicide sacrifices what some citizens regard as their dignity in order to preserve the lives of others. This choice seems at worst debatable; it can hardly be characterized as arbitrary.<sup>166</sup> By contrast, a government which condemns some citizens to avoidable physical agony in order to preserve others against the risk of death is on shakier ground. The sacrifice the state demands in pursuit of its ends is not so clearly justified, if it is justified at all.

#### 4. *Rights, Pain, and the Future*

If the O'Connor/Breyer position grants constitutional stature to a right to avoid government-imposed pain, where might the perception lead? The opinions clearly contemplate potential judicial review were legislation or regulations to prohibit physicians from administering doses of pain medication necessary to avoid terminal suffering. But it is far from clear that such legislation or regulations in fact exist.<sup>167</sup> So, too, some commentators maintain that a small percentage of patients suffer physical agony that cannot be controlled by medication. If this is true—and it is not clear whether these estimates of 5-10% of some classes of terminal patients account for the possibility of "terminal sedation" by which a patient is kept permanently unconscious as a way of avoiding pain<sup>168</sup>—a suit by such a patient

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166. Cf. *Chandler v. Miller*, 117 S.Ct. 1295, 1305 (1997) (striking down required drug test of candidates for state office as reducing "privacy for a symbol's sake").

167. See, e.g., Council on Ethical and Judicial Affairs, *supra* note 164; George Annas, *The "Right to Die" in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875, 895 (1996) (prescribing pain medication is not illegal; no doctor has ever been prosecuted); 1 ALAN MEISEL, *THE RIGHT TO DIE* 590 (2d ed. 1995) (no basis for fear of criminal liability); *id.* at 592 (no basis for fear of license revocation for provision of narcotics to patients suffering serious pain).

168. Justice Breyer comments that "[m]edical technology, we are repeatedly told makes the administration of pain relieving drugs sufficient, except for a very few individuals for whom the ineffectiveness of pain control medicines can mean, not pain but the need for sedation which can end in a coma." *Glucksberg*, 117 S. Ct. at 2312-13. Justice Stevens, by contrast cites authorities which he thinks stand for the proposition that "palliative care . . . cannot alleviate all pain and suffering." *Id.* at 2308.

Compare David Orentlicher, *The Legalization of Physician Assisted Suicide: A Very Modest Revolution*, 38 B.C. L. REV. 443, 454 (1997) ("not all physical pain can be treated"), cited by Justice Stevenes, with Michael H. Levy, *Drug Therapy: Pharmacologic Treatment of Cancer Pain*, 335 NEW ENG. J. MED. 1124, 1124 (1996) (commenting that "[n]o patient with cancer

who sought the means to escape pain by ending her life could also invoke the concurrences' concerns. Again, however, it appears that the number of such cases is likely to be small.

Justice Breyer writes carefully in suggesting a right against "severe physical pain (connected with death)" or "(accompanying death)."<sup>169</sup> But to the extent that I have adequately reconstructed the rationale for the focus on physical pain, it is hard to discern why the claim to avoid agonizing physical pain should be limited to those who are dying. Prisoners retain the right to avoid unnecessary infliction of pain during their lives; presumably civilians can invoke similar interests. At the very least, prohibitive laws which eliminate the possibility of avoiding pain or physical harm should be subject to severe constitutional scrutiny. Thus, in the looming disputes over needle exchanges,<sup>170</sup> and access to morphine as an analgesic in non-terminal cases,<sup>171</sup> the courts need not stand aside in the face of merely rational state interests.

More controversially, the focus on physical pain could ground a right of access to certain types of medical treatment. To the extent that government intervention establishes institutional structures that bar access to medical treatment that can eliminate physical agony, the O'Connor/Breyer concurrences provide a hook for constitutional review. The claim would not embrace every intervention that could improve health outcomes. The right in question is rooted in a revulsion against torture, which comprises

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needs to live or die with unrelieved pain" because "cancer pain can be effectively treated in 85-95% of patients. . . . In the final days of life, pain not controlled . . . can be relieved by intentional sedation"). Cf. Nathan I. Cherney & Russell K. Portenoy, *Sedation in the Management of Refractory Symptoms: Guidelines for Evaluation and Treatment*, 10 J. PALLIATIVE CARE 31 (1994); *Terminal Sedation in the Care of Dying Patients*, ARCH INT. MED., 1785 (Sept. 9, 1996) (estimates of frequency of symptoms that cannot be relieved short of terminal sedation range from 5% to 52%).

169. *Glucksberg*, 117 S. Ct. at 2311-12.

170. It is clear that needle exchange programs are effective in preventing the spread of AIDS among injection drug users. See Peter Lurie and Ernest Drucker, *An Opportunity Lost: HIV Infections Associated With Lack of a National Needle-Exchange Programme in the USA*, 349 LANCET 604, 605 (1997) (estimating between 4000 and 9600 cases of AIDs could have been prevented by needle exchange programs, and more than 11,000 could be prevented in the next five years; noting that staff members in needle exchange programs have been arrested); Don C. Des Jarlais et al., *HIV Incidence Among Injecting Drug Users in New York City Syringe-Exchange Programmes*, 348 LANCET 987 (1995) (reviewing the efficacy of needle-exchange programs in preventing the spread of AIDS). But federal and local prohibitions on the distribution of sterile drug injection materials make these programs illegal in some areas, and infeasible in others. See Lawrence O. Gostin et al., *Prevention of HIV AIDS and other Blood Borne Diseases Among Injection Drug Users: A National Survey on the Regulation of Syringes and Needles*, 277 JAMA 53 (1997); cf. *Commonwealth v. Leno*, 616 N.E.2d 453 (Mass. 1993); *State v. Sorge*, 591 A.2d 1382 (N.J. Super. 1991); *People v. Bordowitz*, 588 N.Y.S.2d 507 (1991). See also Katharine Q. Seelye, *AMA Calls for Needle Exchanges*, N.Y. TIMES, June 27, 1997, at A15.

171. See, e.g., Hill, *When Will Adequate Pain Treatment Be the Norm?*, 274 JAMA 1881 (1995); Diane Gianelli, *Controlling Chronic Pain*, 40 AM. MED. NEWS 1, Mar. 17, 1997.

the government imposing current physical agony on real individuals. But a government-mandated HMO that systematically denies medically indicated emergency room care, like a health official who denies the latest generation of protease inhibitors to homeless individuals, or a system that rations other life-saving care parsimoniously would seem *prima facie* to violate the same principle that inhibits the government from "preventing . . . the administration of drugs as needed to avoid pain at the end of life."<sup>172</sup>

The claim is not without potential doctrinal obstacles. Justice Breyer exonerates the government from responsibility for the "institutional reasons or inadequacies or obstacles" which currently inhibit the delivery of palliative treatment; he would entertain a claim only "were state law to prevent the provision of palliative care," which "forces a dying person to undergo [severe] pain."<sup>173</sup> The determinative issue will be what quantum of state involvement is adequate to trigger constitutional concern. In Eighth Amendment jurisprudence, only "deliberate indifference" to serious medical needs is proscribed; in the parallel issue of safety in custodial facilities, a choice informed by medical judgment is enough to meet the standards of due process,<sup>174</sup> and there is always the possibility that the state may disclaim responsibility for the actions of the agents to whom it has left crucial choices.<sup>175</sup> But as the government moves to an increasingly extensive involvement in and regulation of medical care, the *Glucksberg* concurrences provide hope of a constitutional minimum of decency in the administration of that system.

## VI. Conclusion: The Supreme Court as Teacher

In an increasingly diverse society, the risk grows that we will lose our power to actually engage one another on moral issues. The Supreme Court

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172. Cf. David Bansberg, MPH, M.D., et al., *Protease Inhibitors in the Homeless*, 278 JAMA 63 (1997). A court seeking to avoid entanglement in the area could still claim that the constitutional inhibition extends only to "unnecessary" imposition of physical pain. See *Glucksberg*, 117 S. Ct. at 2311 (Breyer, J., concurring). But in the prison context, the Eighth Amendment prohibits "deliberate indifference to serious medical needs." See *Estelle v. Gamble*, 429 U.S. 97, 104, 106 (1976).

173. 117 S.Ct. at 2312.

174. See *Youngberg v. Romero*, 457 U.S. 307, 319 (1982).

175. Compare *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189 (1989); *Collins v. Harker Heights*, 503 U.S. 115 (1992); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (decisions by nursing homes receiving Medicaid funds were not state action); with, e.g., *Catanzano v. Dowling*, 60 F.3d 113 (2d Cir. 1995) (decisions by certified home health agencies denying services are state action requiring due process); *Grijalva v. Shalala*, 946 F. Supp. 747 (D. Ariz. 1996) (Medicare HMO decision denying services is state action requiring due process). A great deal is likely to turn on the degree to which the government is directly and intentionally responsible for the structure in question, and the degree to which it has preempted other structures of care.

can sometimes counteract these dangers by providing a locus of common moral deliberation. When it takes this role, it can, on occasion, furnish a common vocabulary to discuss and resolve contentious issues. But, as many commentators have noted, in the process of resolving cases authoritatively, the Court risks excluding legitimate moral viewpoints from subsequent public discussion. This has been one critique of the Court's decision in *Roe v. Wade*.<sup>176</sup>

In this dimension, the *Glucksberg* decision avoids this arguable failing of *Roe*; each of the opinions takes seriously the claims of tragic deprivation advanced by the opposing camps before the Court. The opinions that explicitly leave open the possibility of future judicial intervention fully acknowledge the good faith of the proponents of prohibition. And Justice Rehnquist's majority opinion, unlike some of the prior cases in which the court has deferred to the political process by dismissing claims of constitutional protection as "facetious,"<sup>177</sup> accepts and embraces a role for the Court in guarding the bodily integrity of the citizenry. The majority sounds sincere when it acknowledges an "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."<sup>178</sup>

Each of the opinions emphasizes the ongoing discussion in which society is engaged.<sup>179</sup> When all of the opinions are taken together, the Court frames and advances that debate rather than ending it. By highlighting rather than belittling the tragic dimensions of assisted suicide, the Court has thus laid the groundwork for continued moral conversation.

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176. See, e.g., GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW 98-110 (1985); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 344-351, 357-62 (1992); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 45-50 (1987).

177. See, e.g., *Bowers v. Hardwick*, 478 U.S. at 186, 194 (1986).

178. *Glucksberg*, 117 S. Ct. at 2275.

179. See *id.* (Rehnquist, C.J.) ("Americans are engaged in an earnest and profound debate . . ."); *id.* at 2303 (O'Connor, J., concurring) ("Every one of us at some point may be affected . . . [t]here is no reason to think the democratic process will not strike the proper balance . . ."); *id.* at 2293 (Souter, J., concurring) (Court should "stay its hand to allow reasonable legislative consideration").



